2013

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CONNECTICUT
LAW REVIEW

VOLUME 46 NOVEMBER 2013 NUMBER 1

Article

Between *Seminole Rock* and a Hard Place: A New Approach to Agency Deference

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In Bowles v. Seminole Rock & Sand Co. *the United States Supreme Court held that federal courts must defer to an administrative agency's interpretation of its own regulation unless the interpretation "is plainly erroneous or inconsistent with the regulation." Astoundingly, despite its doctrinal significance and practical importance to our administrative state, the* Seminole Rock *deference doctrine has gone largely unexamined both by the legal community and by the Supreme Court, particularly when compared to the landmark deference doctrines announced in* Skidmore v. Swift & Co. *and* Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.

This Article explores the genesis of this deference regime and analyzes the Supreme Court's articulation, application, and interpretation of the Seminole Rock *doctrine from its inception in 1945 to the present day. The Article then proposes a new approach to the* Seminole Rock *doctrine. Under this new approach, courts would apply a two-step test to determine whether to defer to an agency's interpretation of its regulation. By relying upon objective factors, thereby limiting the subjective inquiry, this new approach falls comfortably between* Chevron*'s controlling deference and* Skidmore*'s less deferential treatment that courts currently apply when reviewing an agency's interpretation of a statutory provision. Such an approach would refine the deference regime to achieve better workability, greater fairness, transparency, and increased public participation. It would also balance the competing regulatory and separation of powers concerns inherent in this critical deference question.*

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Between *Seminole Rock* and a Hard Place: A New Approach to Agency Deference

KEVIN O. LESKE*

I. INTRODUCTION

Over sixty-five years ago, in *Bowles v. Seminole Rock & Sand Co.*,[1] the United States Supreme Court established a little-known yet crucially important administrative law doctrine. In *Seminole Rock*, the Court held that federal courts must defer to an administrative agency's interpretation of its own regulation unless the interpretation "is plainly erroneous or inconsistent with the regulation."[2] Astoundingly, despite its doctrinal significance and practical importance to our administrative state, the *Seminole Rock* deference doctrine, which recently has been called "*Auer* deference,"[3] has gone largely unexamined both by the legal community and by the Supreme Court, particularly when compared to the landmark deference doctrine announced in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[4]

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* Associate Professor of Law, Barry University School of Law. I would like to thank the *Connecticut Law Review* editors and staff for their excellent work on this Article. I also am grateful to Professor Gil Kujovich, Vice Dean for Academic Affairs, of Vermont Law School, and Dean Leticia Diaz of Barry University School of Law for their support. Special thanks go to my brother, Brian J. Leske, for his terrific comments and edits throughout the development of this Article. I dedicate this Article to my parents, Doctors M. Cristina & Gary S. Leske, both extraordinary teachers and scholars, for their lifelong support and encouragement.

[1] 325 U.S. 410 (1945).

[2] *Id.* at 414.

[3] Auer v. Robbins, 519 U.S. 452, 461 (1997). Although *Auer* followed and, to some extent, elaborated on *Seminole Rock*, it remains a mystery why scholars and even some courts—including, most notably, the Supreme Court—have begun using *Auer* instead of *Seminole Rock* to describe the doctrine. *See* William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1089 n.26 (2008) (observing and explaining Justice Scalia's use of the term in his dissent in *Gonzales v. Oregon*, 546 U.S. 243, 277 (2006) (Scalia, J., dissenting)).

[4] *See* 467 U.S. 837, 866 (1984) ("When a challenge to an agency construction of a statutory provision . . . really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail."); Scott H. Angstreich, *Shoring Up* Chevron*: A Defense of* Seminole Rock *Deference to Agency Regulatory Interpretations*, 34 U.C. DAVIS L. REV. 49, 99 (2000) (recognizing that *Seminole Rock* "has lurked beneath the surface and evaded scholarly and judicial criticism"); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 696 (1996) ("*Seminole Rock* deference has not received anything like the attention devoted to *Chevron*, its more famous counterpart. But it is no less, and is arguably more, important to constitutional governance."); *see also* 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 3.5 (4th ed. 2002) (observing the countless times

As several scholars have observed, there are myriad problems inherent in giving an agency this type of so-called "controlling" deference.[5] As a theoretical matter, because the current *Seminole Rock* standard affords great deference to an agency's interpretation, an agency has an incentive "to promulgate excessively vague legislative rules" and "leave the more difficult task of specification to the more flexible and unaccountable process of later 'interpreting' these open-ended regulations."[6] And the "more misty or vacuous the regulations, the broader is the discretion to interpret, and the less predictable will be the interpretations."[7] An agency can thus, in theory and in practice, expand its own power while at the same time avoiding the burdensome notice and comment process of the Administrative Procedure Act (APA).[8]

Chevron has been cited by scholars and the courts); Melanie E. Walker, Comment, *Congressional Intent and Deference to Agency Interpretations of Regulations*, 66 U. CHI. L. REV. 1341, 1346 (1999) ("*Chevron* is one of the most widely discussed cases in academic literature."). In fact, a search of *Chevron* on June 30, 2013 returned over 7000 citing references in the Lexis "Law Reviews" database, while a similar search of *Seminole Rock* returned just over 260. Restricted *Shepard's* Summaries for *Chevron* and *Seminole Rock*, LEXIS ADVANCE, https://advance.lexis.com (search "467 U.S. 837" in "Cases"; when *Chevron* decision appears, select "*Shepardize*"; then select "Citing Law Reviews, Treatises" at the top of the results page; then select "Law Reviews" from Content menu on left side of the page; repeat process, this time searching for "325 U.S. 410"); *see also* Walker, *supra*, at 1346 n.19 (noting that a search of the Westlaw database returned 2912 secondary source citations to *Chevron* in 1999); *cf.* Russell L. Weaver, *Judicial Interpretation of Administrative Regulations: The Deference Rule*, 45 U. PITT. L. REV. 587, 589 (1984) ("Although commentators have lavished attention on the subject of statutory construction, they have virtually ignored the problem of how to interpret regulations.").

[5] I will refer to *Seminole Rock* deference as "controlling" deference because it conforms to the Court's view that the agency's "administrative interpretation[] . . . becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Seminole Rock*, 325 U.S. at 414; *accord* Weaver, *supra* note 4, at 591 (calling certain deference rules, including *Seminole Rock*'s, "controlling" because they are outcome determinative). Other scholars have referred to it as "binding deference." *See* Manning, *supra* note 4, at 617 (discussing the concept of "binding deference," which requires "a reviewing court to accept an agency's reasonable interpretation of ambiguous legal texts, even when a court would construe those materials differently as a matter of first impression").

[6] Lars Noah, *Divining Regulatory Intent: The Place for a "Legislative History" of Agency Rules*, 51 HASTINGS L.J. 255, 290 (2000); *see also* Robert A. Anthony & Michael Asimow, *The Court's Deferences: A Foolish Inconsistency*, 26 ADMIN. & REG. L. NEWS, Fall 2000, at 10, 11 (observing that if an agency is confident that it will receive controlling deference for its interpretation, it creates "a powerful incentive for agencies to issue vague regulations, with the thought of creating the operative regulatory substance later through informal interpretations").

[7] Anthony & Asimow, *supra* note 6, at 11. There is the added concern that these regulatory interpretations will be developed internally and issued informally, with no public notice or ability to challenge them in court, absent an adjudication for a violation of the regulation being interpreted. *See id.* ("[T]he affected public will usually be unable to participate in shaping the informally-issued regulatory interpretations or to effectively challenge them in court.").

[8] Administrative Procedure Act, 5 U.S.C. § 552 (2012); *see* Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 COLUM. L. REV. 1235, 1309 (2007) ("[T]he [*Seminole Rock*] doctrine may tempt agencies to issue vague regulations through the relatively burdensome notice-and-comment process"); *see also* Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting) ("It is perfectly understandable, of course, for an agency to issue

The practical consequences of such a deference regime can therefore be enormous because most substantive legal rules defining private rights and obligations are created by agencies applying regulations, rather than by Congress directly passing statutes.[9] For example: unaware of an agency's changed interpretation of its regulation, a woman with five minor children lost benefits previously granted to her;[10] a power company that relied on a previous interpretation of a Clean Air Act regulation was sued after the Environmental Protection Agency (EPA) changed its view of that same regulation;[11] and the new regulatory interpretation by the U.S. Army Corps of Engineers during a review of a Clean Water Act permit opened the door to the destruction of crucial headwater streams in Appalachia.[12]

As a constitutional matter, the current *Seminole Rock* standard raises separation of powers concerns, a view most notably championed by Professor John F. Manning.[13] By allowing an agency to resolve ambiguities it created in its own regulations, an agency has effectively been granted the power of "self-interpretation."[14] This power "contradicts a major premise of our constitutional scheme and of contemporary separation of powers case law—that a fusion of lawmaking and law-exposition is especially dangerous to our liberties."[15] In Manning's view, there must be a minimum amount of daylight between lawmaking and law interpretation in order to be consistent with the separation of powers

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vague regulations, because to do so maximizes agency power and allows the agency greater latitude to make law through adjudication rather than through the more cumbersome rulemaking process.").

[9] *See* Manning, *supra* note 4, at 614–15 (listing examples of agency-established regulations such as those seeking a civil penalty through an enforcement proceeding or adjudicating a claim for federal benefits).

[10] Gardebring v. Jenkins, 485 U.S. 415, 433–34 (1988) (O'Connor, J., concurring).

[11] *Cf.* Richard J. Pierce, Jr., *Democratizing the Administrative State*, 48 WM. & MARY L. REV. 559, 566–67 (2006) (describing the "policy dispute over the meaning of 'modification' in the Clean Air Act" and arguing that "[i]t does not seem right to impose many billions of dollars of regulatory costs on firms for engaging in conduct that would not have been required under interpretations in effect either at the time the firms engaged in the conduct or at the present time").

[12] *See, e.g.*, Ohio Valley Envtl. Coal v. Aracoma Coal Co., 556 F.3d 177, 203 (4th Cir. 2009) ("[W]hatever the role of the headwater streams in overall wastershed ecology, the Corps is not required to differentiate between headwater and other stream types in the determination of mitigation measures.").

[13] *See* Manning, *supra* note 4, at 638–39, 654 (discussing the relationship between *Chevron* and *Seminole Rock* and the "separation of lawmaking from law-exposition," and applying a separation of powers analysis to the *Seminole Rock* decision). Professor Manning also believes *Seminole Rock* deference warrants closer scrutiny because of its practical implications for administrative governance and the Court's "movement away from deference to agency interpretations of law." *Id.* at 614–16.

[14] *See id.* at 655 ("The right of self-interpretation under *Seminole Rock* removes an important affirmative reason for the agency to express itself clearly; since the agency can say what its own regulations mean (unless the agency's view is plainly erroneous), the agency bears little, if any, risk of its own opacity or imprecision.").

[15] *Id.* at 617.

doctrine.[16] Controlling deference under the current *Seminole Rock* doctrine does not meet this requirement.[17]

Compounding each of these problems—and providing a key justification for the new approach proposed herein—several noted scholars have voiced serious doctrinal concerns with the current *Seminole Rock* standard. Professor Russell Weaver, for instance, observes that courts "have experienced great difficulty in interpreting regulations and applying the [*Seminole Rock*] deference rule to them."[18] He notes that even after *Seminole Rock* was decided, the Supreme Court has applied various deference standards and has "never adequately explained how they should be applied."[19] Many other legal scholars have likewise concluded that the amount of deference to be afforded to an agency interpreting its own regulation is ambiguous at best.[20]

Building on Professor Weaver's work, Professor Robert A. Anthony has further criticized the current *Seminole Rock* standard based on its conflict with many of the provisions and underlying goals of the APA.[21] He argues that by forcing courts to defer to agency interpretation, the *Seminole Rock* standard subverts the APA's delegation to courts of determining "the meaning or applicability of the terms of an agency

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[16] *Id.* at 618.

[17] *See id.* at 654–81 (discussing the questionable approach to separation of powers analysis utilized in *Seminole Rock*).

[18] Weaver, *supra* note 4, at 589. As others in the legal community have noted, most of the scholarship on judicial deference to an agency's interpretation of its regulation "has emanated from the pen of Russell Weaver" starting in the 1980s. Angstreich, *supra* note 4, at 67 n.70; *see, e.g.*, Russell L. Weaver, *Challenging Regulatory Interpretations*, 23 ARIZ. ST. L.J. 109, 124–25 (1991) (discussing the different standards of the deference rule, which result in a varying level of review for each case); Russell L. Weaver, *Deference to Regulatory Interpretations: Inter-Agency Conflicts*, 43 ALA. L. REV. 35, 36–38 (1991) (stating that "the courts have disagreed as to how the deference rules should be applied"); Russell L. Weaver, *Evaluating Regulatory Interpretations: Individual Statements*, 80 KY. L.J. 987, 987–88 n.3 (1991–1992) (stating that "[t]he Court has applied other standards as well," with regard to the deference rule); Russell L. Weaver, *Judicial Interpretation of Administrative Regulations: An Overview*, 53 U. CIN. L. REV. 681, 683–84 (1984) (discussing problems facing courts when interpreting agency regulations); Russell L. Weaver & Thomas A. Schweitzer, *Deference to Agency Interpretations of Regulations: A Post-*Chevron *Assessment*, 22 MEM. ST. U. L. REV. 411, 411 (1992) (stating that the deference principles applied by the courts "were not always consistent with each other").

[19] Weaver, *supra* note 4, at 592.

[20] *See, e.g.*, Eskridge & Baer, *supra* note 3, at 1184 ("The amount of deference *Seminole Rock* requires has always been ambiguous, also contributing to doctrinal confusion for those lower courts and commentators who follow such matters."); Hickman & Krueger, *supra* note 8, at 1307 ("[T]he Court has not clearly established the bounds of *Seminole Rock* deference.").

[21] Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 ADMIN. L.J. AM. U. 1, 9–10 (1996) (stating that "[t]he intent of . . . [section 706 of the APA requiring a reviewing court to determine the meaning of the terms of an agency action] manifestly was to arm affected persons with recourse to an independent judicial interpreter of the agency's legislative act, where, after all, the agency is often an adverse party" and the role of the court is "a far cry" from pure deference to the agency).

action."[22] This abdication of the court's role contradicts the APA's purpose in giving "affected persons . . . recourse to an independent judicial interpreter of the agency's legislative act, where, after all, the agency is often an adverse party."[23]

The limitations and shortcomings in the *Seminole Rock* deference regime have not gone unnoticed by members of the Supreme Court. Over twenty years ago, Justice Thurgood Marshall warned that *Seminole Rock* deference must not be "a license for an agency effectively to rewrite a regulation through interpretation."[24] And more recently, several members of the Supreme Court have questioned the *Seminole Rock* doctrine. For example, Justice Clarence Thomas (joined by three colleagues) suggested that "agency rules should be clear and definite so that affected parties will have adequate notice concerning the agency's understanding of the law."[25] He opined that by allowing an agency to give "effect to such a hopelessly vague regulation, the Court disserves the very purpose behind the delegation of lawmaking power to administrative agencies, which is to 'resol[ve] . . . ambiguity in a statutory text.'"[26] He also recognized that such authority undermines the notice and comment rulemaking process specifically embodied in the APA.[27]

And even more recently, in 2011, Justice Scalia wrote a short concurring opinion specifically to highlight his newfound discomfort with the doctrine: "For while I have in the past uncritically accepted that rule, I have become increasingly doubtful of its validity." [28] He then concluded by stating: "We have not been asked to reconsider *Auer* in the present case. When we are, I will be receptive to doing so."[29] He soon amplified his criticism of the *Seminole Rock* doctrine in an opinion he wrote in the Court's 2012–2013 Term, where he explicitly called for the rejection of the

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[22] Anthony, *supra* note 21, at 23 (quoting 5 U.S.C. § 706 (1994)).

[23] *Id.* at 9. Professor Anthony also contends that the *Seminole Rock* doctrine contradicts the APA's purpose in allowing for an "exception for interpretative rules in § 553." Anthony & Asimow, *supra* note 6, at 11. These rules should be subject to "plenary judicial review." *Id.* (citing 5 U.S.C. § 553).

[24] Mullins Coal Co. v. Dir., Office of Workers' Comp. Programs, 484 U.S. 135, 170 (1987) (Marshall, J., dissenting) (citing Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945)).

[25] Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting).

[26] *Id.* at 518, 525 (alterations in original) (quoting Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 696 (1991)); *see also* Manning, *supra* note 4, at 615–16 (recognizing Justice Thomas's criticism of *Seminole Rock*'s underpinnings). Thus, although controlling deference may on the one hand simplify judicial review, it "disserve[s] the interests of the affected public and of persons concerned with the fairness, efficiency and acceptability of governmental processes." Anthony & Asimow, *supra* note 6, at 11.

[27] *Thomas Jefferson Univ.*, 512 U.S. at 525 (Thomas, J., dissenting).

[28] Talk Am., Inc. v. Mich. Bell Tel. Co., 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring).

[29] *Id.*

Seminole Rock/Auer deference doctrine.[30] Justice Scalia's opinion prompted Chief Justice Roberts to write separately, joined by Justice Alito, to make the Supreme Court bar "aware that there is some interest in reconsidering those cases."[31]

As a result of these numerous and substantial concerns, some scholars have argued that the Supreme Court should overrule *Seminole Rock*. They claim an agency's interpretation of its own regulation should be reviewed under the less deferential standard set forth in *Skidmore v. Swift & Co*.[32] Under *Skidmore*, courts are directed to weigh an agency's interpretation according to "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[33] Applying such a standard, so their argument goes, would provide an independent judicial check that would be more faithful to the constitutionally required separation of powers.[34] It also would purport to address the other concerns by helping remove the incentive to draft vague regulations.[35]

Other scholars have reached the opposite conclusion. They argue that the Court should reaffirm the *Seminole Rock* doctrine because "[t]he division of responsibility for statutory interpretation that *Chevron* formalized would be undermined if courts reviewed an agency's informal regulatory interpretation under *Skidmore*."[36] Under this theory, courts cannot carry out *Chevron*'s mandate to defer to an agency's reasonable interpretation of ambiguous statutory language until it has determined the meaning of the regulation at issue.[37] And if a court first rejects the

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[30] Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326, 1342 (2013) (Scalia, J., concurring in part and dissenting in part).

[31] *Id.* at 1338 (Roberts, C.J., concurring).

[32] 323 U.S. 134, 140 (1944); *see* Anthony, *supra* note 21, at 10 (advocating for a less deferential standard); Manning, *supra* note 4, at 618 (same).

[33] *Skidmore*, 323 U.S. at 140.

[34] Manning, *supra* note 4, at 618–19.

[35] Anthony, *supra* note 21, at 11–12.

[36] Angstreich, *supra* note 4, at 59; *accord* Pierce, *supra* note 11, at 567–68 (suggesting that courts adopt the *Auer* deference standard). In *Chevron*, the Court found that once Congress delegates rulemaking authority to an agency, courts generally must follow the agency's regulations that have been promulgated under that grant of power, as well as to defer to the agency's interpretation of statutory provisions it administers. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843–45 (1984). The *Chevron* doctrine is discussed in more detail *infra* Part II.B.2. At the time, Mr. Angstreich's principal concern was that the Court's recent decision in *Christensen v. Harris County*, 529 U.S. 576, 577 (2000), which refused to extend *Chevron* deference to informal interpretations of statutes, foreshadowed the overruling of *Seminole Rock* deference for informal agency interpretations of regulations. *See* Angstreich, *supra* note 4, at 57–58 ("[A] wholesale shift from *Seminole Rock* to *Skidmore*, and even the partial shift that would result from the Court's using *Christensen* to overrule *Auer*'s holding . . . would undermine *Chevron*'s allocation of responsibility for statutory interpretation.").

[37] Angstreich, *supra* note 4, at 58.

agency's interpretation of an ambiguous regulation under *Skidmore*, it would not approach the statutory interpretation question under *Chevron* from the perspective of the agency's understanding of the regulation.[38] Thus, the court, rather than the agency, would assume the role of making policy decisions, which would be in contravention of one of *Chevron*'s key underlying rationales.[39] Reaffirmation of *Seminole Rock* is consequently necessary to "shore up" *Chevron* deference.[40]

Both of these competing views muster powerful arguments in support of their respective positions. After careful consideration, I do not agree that the *Seminole Rock* standard should be completely abandoned and replaced with the *Skidmore* standard. Nor do I agree, however, that the *Seminole Rock* standard should remain in its current form and reaffirmed by the Court. Instead, I offer a new approach.

A comprehensive analysis of the Court's opinions that apply the *Seminole Rock* doctrine, as well as the various deference regimes, reveals three things. First, substantial doctrinal inconsistency, even confusion, exists with respect to this deference question, particularly when an agency is interpreting its regulation informally. Second, when the Court has invoked the *Seminole Rock* doctrine, it has engaged in a far more searching inquiry than the plain text of the standard would suggest. And third, many of the factors actually considered by the Court in those opinions promote fair notice, consistency, and accountability in the administrative state, while muting concerns regarding unconstitutional agency "self-interpretation" and a lack of an independent judicial check on the agency interpretation.

My proposed approach to determine whether to defer to an agency's interpretation of its regulation is a formal, clearly articulated, and relatively simple standard. It incorporates many of the objective factors previously applied by the Court to the deference question, as well as traditional factors courts have looked to when approaching interpretative questions. By relying upon objective factors, limiting the subjective inquiry, and erring, in a sense, on the side of the original *Seminole Rock* deference standard, this new approach would fall comfortably between *Chevron*'s controlling deference and *Skidmore*'s less deferential treatment that the courts apply when reviewing an agency's interpretation of an ambiguous statutory provision.[41]

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[38] *Id.*

[39] *Id.*

[40] *See id.* (arguing that "*Skidmore*'s potential for undermining *Chevron* leads to a justification for *Seminole Rock* deference"). In making his argument, Mr. Angstreich also staunchly defends *Seminole Rock* from the criticism that "it gives agencies too great an incentive to promulgate vague regulations, violates the Administrative Procedure Act, and is incompatible with the constitutional principle of separation of powers." *Id.* at 51.

[41] This new approach would recognize the justifications underlying both *Chevron* and *Skidmore*

This new approach to an old question would likewise address many of the concerns voiced over the past several decades by both scholars and various members of the Court. It also has the benefit of being a pragmatic solution. Indeed, given both the Court's recent movement toward cabining agency deference and its understandable reluctance to overrule its precedent, a clarification and reformulation of the *Seminole Rock* deference regime in this manner would allow the Court to remain faithful to its current (yet evolving) deference principles without overruling *Seminole Rock* expressly.

Part II of this Article begins by looking at the Court's deference doctrines established under both *Skidmore v. Swift & Co.* and, forty years later, *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc*. A brief examination of these doctrines as they apply to an agency's interpretation of federal statutes will be helpful in framing the separate but related question regarding an agency's interpretation of its regulation.

Part III examines the Court's decision in *Bowles v. Seminole Rock & Sand Co.* and explores the genesis of its deference regime. Because the Court did not explain its justification in its opinion, this Part by necessity also discusses how the Court subsequently explained its rationale for the doctrine in other opinions.

Part IV next analyzes the development and trends surrounding the Supreme Court's articulation, application, and interpretation of the *Seminole Rock* doctrine from its inception to the present day. This study shows that the Court has been somewhat inconsistent when applying the doctrine, thereby helping to contribute to the doctrinal confusion that currently exists. In fact, since *Seminole Rock* was decided in 1945, this analysis shows that the Court has—at different times—ignored the standard,[42] set forth differing articulations of the original standard,[43] and

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deference and require courts to approach the deference question with a degree of independence—which falls between these two doctrines. The *Chevron* doctrine rests on the notion that Congress implicitly has delegated authority to the agency to interpret the statutory scheme. *See* Pierce, *supra* note 11, at 568 (discussing that the *Chevron* deference standard is based on constitutional principles where "politically unaccountable judges cannot overrule policy decisions made by politically accountable agencies"). And although *Chevron* does not technically mandate "the courts to abdicate their responsibility for interpreting the law altogether," when *Chevron* applies, the agency is granted controlling deference. Hickman & Krueger, *supra* note 8, at 1249. Thus, courts approach the inquiry with no real independent judgment and instead look simply to determine whether the agency's interpretation is reasonable. *See id.* ("[U]nless circumstances otherwise suggest arbitrary or unreasonable behavior, reviewing courts are often wise to defer to an agency's greater expertise, and sometimes, extensive interpretive efforts"). The *Skidmore* doctrine, on the other hand, is primarily based on the Court's respect for the agency's experience and expertise, reflecting "a policy of judicial prudence." *Id.* Courts are, however, granted some liberty to weigh subjective factors, such as "the thoroughness evident in [the agency's] consideration" and ultimately, its persuasiveness, in determining whether to defer. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). Thus, under *Skidmore*, courts wield more independent judgment when interpreting the regulation than under *Chevron*.

[42] *See* Eskridge & Baer, *supra* note 3, at 1103–04 (observing that the Court routinely failed to

introduced and incorporated different factors altogether in the standard.[44]

Finally, Part V proposes a new approach to the *Seminole Rock* doctrine. Under this new approach, courts would apply a straightforward two-step test to determine whether to defer to an agency's interpretation of its regulation. First, as is done when applying the familiar *Chevron* deference test, courts would determine whether the regulation is unambiguous. If the regulation is unambiguous, then the court's inquiry naturally would end because it is axiomatic that an agency must follow the plain language of its regulations. Second, if the regulation is ambiguous, courts would look to four factors to resolve the deference question: (1) the agency's stated intent when the regulation was promulgated; (2) whether the interpretation had been consistently held by the agency; (3) in what format the interpretation appears; and (4) whether the regulation being interpreted "parrots" or otherwise restates the statutory text (whereby the agency's view is actually statutory interpretation masquerading as regulatory interpretation).

II. A DEFERENTIAL FRAMEWORK

A. *Introduction*

Like any law review article examining a jurisprudential doctrine that has spanned six decades, this Article cannot turn over every rock. Thus, before turning to the Court's deference doctrines, it is necessary at the outset to take a moment to highlight what this Article does and does not do. Several of these points may be fairly obvious; others, however, may be worthy of additional explanation.

First, the issue presented here concerns an agency's interpretation of its regulation, and not its governing statute. The latter case, of course, is governed by *Chevron*'s deference regime, as will be re-introduced below. To be sure, agency regulations have their origin in federal statutes by embodying the Congressional delegation of authority to administer those statutes. But more often than not, Congress grants agencies broad power and expects them to make difficult and complex policy choices that

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apply *Seminole Rock*).

[43] *See, e.g.*, Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 706 (1991) (giving the agency "deference so long as [its interpretation] is reasonable"); Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 150 (1991) (giving the agency "substantial deference"); Ehlert v. United States, 402 U.S. 99, 105 (1971) (recognizing that deference is appropriate for "reasonable" and "consistently applied" interpretations).

[44] *See, e.g.*, Gonzales v. Oregon, 546 U.S. 243, 257 (2006) (indicating that an interpretation of a parroting regulation is not eligible for *Seminole Rock* deference); Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994) (requiring deference unless an "alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation" (quoting Gardebring v. Jenkins, 485 U.S. 415, 430 (1988))).

Congress was not willing to make or that it entrusted to agencies.

The task of "administering a statute" is accomplished by the agency in many ways, including through the promulgation of regulations and the accompanying interpretation of those regulations. Naturally, these interpretations, whether an interpretation of the statute or the regulation, can be "expressed in a great variety of forms—in legislative regulations, adjudicatory opinions, manuals, court briefs, interpretive rules, policy statements, staff instructions, opinion letters, audits, correspondence, informal advice, guidelines, press releases, testimony before Congress, internal memoranda, speeches, explanatory statements in the Federal Register, and others."[45] And particularly since these less formal means of interpreting regulations now dominate the administrative state and effectively have the force of law by essentially defining the legal rights and obligations of the public, the particular deference question addressed herein is (ironically) far from academic.[46]

Next, given that the *Seminole Rock* doctrine has not been explored to nearly the degree of many of the other deference doctrines, there are a plethora of unresolved questions in this area. These include:

- how and to what extent *Chevron* applies when, in addition to challenging the agency's interpretation of the regulation under *Seminole Rock*, a party challenges the validity of the regulation as interpreted by the agency under the statute;[47]
- why the Supreme Court routinely declines to invoke the *Seminole Rock* doctrine despite its applicability to the case before it;[48] and

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[45] Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1, 2 (1990).

[46] For the most part, this Article does not distinguish among the various specific informal manners in which an agency expresses its interpretation of its regulation. To be sure, the format is important and ought to be considered when resolving the deference question. In fact, this factor is considered as part of the proposed new approach discussed herein. *See infra* Part V.

[47] The few scholars who have explored *Seminole Rock* deference have reached different conclusions on this issue. Mr. Angstreich, for example, maintains that the application of *Seminole Rock* deference "will be a prelude to the *Chevron* two-step, because the output of applying *Seminole Rock* deference is an input in the application of *Chevron* deference." Angstreich, *supra* note 4, at 73. In other words, under his view, courts must first interpret the regulation (or decide whether or not to defer to the agency in its interpretation) under *Seminole Rock* before deciding whether the interpretation would be inconsistent with the statute under *Chevron*. Professor Manning, on the other hand, is of the view that "to get to *Seminole Rock* deference, a court must first address the straightforward *Chevron* question whether an agency regulation, as interpreted, violates the statute." Manning, *supra* note 4, at 627 n.78.

[48] Professor Eskridge and Ms. Baer have conducted an empirical study of cases where the Supreme Court addressed agency interpretations. Eskridge & Baer, *supra* note 3, at 1089–90. The study and data extended to cases in which *Seminole Rock* was applicable—whether that specific

- whether the Court should extend its holding in *United States v. Mead Corp.*[49] (that an agency's informal statutory interpretation is only subject to *Skidmore* deference) to an agency's informal interpretation of its regulation.[50]

In general, the questions involving the specific interplay between *Chevron* and *Seminole Rock* are beyond the scope of this particular Article. Moreover, because agencies are often provided with significant leeway and, often times, very few limitations from Congress as how to achieve the statutory goal, the applicability of *Chevron* deference is not necessarily at issue in these types of cases. In other words, in most of the cases where a court is determining whether to accept an agency's interpretation of its regulation, both the agency's proffered interpretation and the many other alternate interpretations, such as those advanced by a challenger, would be a reasonable interpretation of the statute under *Chevron*. And the focus of the *Seminole Rock* inquiry is one of regulatory construction to determine what an ambiguous regulation actually means—not the subsequent question of whether that meaning is consistent with the statute. Nor does the underlying justification, if there is one, for the Court's decision not to invoke *Seminole Rock* resolve the question presented by this Article, namely, whether there is an alternative approach to determine whether and to what extent a court should defer to an agency's interpretation of its regulation.[51]

Having stated what this Article does not do, it should be explained what this Article does do. This Article's primary focus is to examine the Supreme Court cases that actually applied the *Seminole Rock* doctrine from its inception in 1945 to the present day, with an emphasis on the factors the Court relied upon in reaching its deference decision. From that analysis

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doctrine was invoked by the Court or not—and documented whether the Court ultimately agreed with or acquiesced in the agency's interpretation. *Id.* at 1120. Professor Eskridge and Ms. Baer concluded that the Court invoked *Seminole Rock*—and several other deference regimes—"in a small minority of cases where [each of] those regimes were applicable." *Id.*

[49] 533 U.S. 218 (2001).

[50] *See id.* at 221 ("[U]nder *Skidmore v. Swift & Co.*, the [tariff classification] ruling [by the U.S. Customs Service] is eligible to claim respect according to its persuasiveness." (citation omitted)); *see also* Anthony & Asimow, *supra* note 6, at 10–11 (discussing the holding of *Christensen* and the adoption of informal agency interpretations).

[51] Of course, to the extent the Court is declining to invoke *Seminole Rock* due to its imprecise parameters, it would support the central goal of this Article, which calls for a clearly-articulated test. There is no data for this assumption, however. As Professor Eskridge and Ms. Baer explain, the decision not to invoke *Seminole Rock* could be because the Court has other deference regime options, or otherwise prefers its ad hoc justifications in this area of law. Eskridge & Baer, *supra* note 3, at 1104–05. But given the confusion and inconsistency that currently exists in the Supreme Court's own cases, *see infra* Part IV, a clear test would be important in this area, particularly for federal district and appellate courts faced with the deference question.

and those factors, it strives to construct and propose a clearly articulated deference standard that would improve the workability of the doctrine in this area. In this way, this Article seeks to contribute in some small measure to the limited, but impressive, scholarship in this area.

B. *A Brief Look at the Court's Related Deference Doctrines*

Before turning to an examination of the *Seminole Rock* doctrine and its development through the years, this Part briefly visits the Supreme Court's deference regimes for agency interpretations of statutory provisions. The Court's judicial deference doctrines in this area have evolved steadily over time in cases such as *Skidmore v. Swift & Co.* and *Chevron U.S.A. Inc. v. National Resource Defense Council, Inc.* Such cases "now function collectively as parts of a comprehensive framework for judicial review of administrative interpretations."[52]

Through these cases, the Court has established and refined distinct tests to determine the level of deference to afford an agency when interpreting a statute. Although scholars have debated whether each approach represents a distinct deference doctrine or whether there is one comprehensive deference doctrine, for practical purposes, they can be categorized as a continuum of deference levels that courts will afford an agency.[53] This continuum ranges from plenary review of an agency's interpretation of a statute (no deference whatsoever), to an intermediate level of respect under *Skidmore*, to a controlling deference standard under *Chevron*. The latter two are discussed below.

1. Skidmore v. Swift & Co.

Until the Supreme Court decided *Skidmore v. Swift & Co.*, its approach to what weight should be given to an agency interpretation lacked a cohesive, identifiable doctrine.[54] Unlike its famous cousin, *Chevron*, the facts presented in *Skidmore* are not well known, and a brief summary will provide a colorful backdrop for this important development in

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[52] Hickman & Krueger, *supra* note 8, at 1239.

[53] Likewise, the Supreme Court appears to be divided on whether there is one deference doctrine or two. *See* Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 852 (2001) ("The opinions in *Christensen v. Harris County* reveal a cleavage of views among the Justices on this issue."). The five Justices in the majority in *Christensen* recognized two deference doctrines, *Chevron* deference and *Skidmore* deference, while four Justices appear to believe that there is only one deference doctrine. *Id.* Of the four Justices that believe in one doctrine, Justice Scalia asserts that *Chevron* is the only deference doctrine, while Justices Stevens, Ginsburg, and Breyer seem to believe that *Chevron* and *Skidmore* are separate manifestations of a single deference doctrine. *Id.* Because it is not critical to resolve this question for the purposes of this Article, I will refer to them as separate doctrines within a broader framework for judicial review of administrative interpretations. *See* Hickman & Krueger, *supra* note 8, at 1239 (discussing the evolution of the Supreme Court's judicial deference doctrine following its decision in *Skidmore*).

[54] 323 U.S. 134, 139 (1944).

administrative law.

In *Skidmore*, seven members of the Swift & Co. packing plant in Fort Worth, Texas, sued under the Fair Labor Standards Act of 1938 to recover overtime pay.[55] Swift & Co. engaged in a "general packing business, [which included] purchasing, handling, slaughtering, dressing, processing, selling and distributing livestock in interstate commerce."[56] The regular daytime work of several of the plaintiffs, including John Skidmore, was operating the company's elevators at the plant.[57] On some nights, however, one of them was required to remain in the fire hall (or within "hailing distance") in order to respond to fire calls.[58] For this extra work, they were paid between fifty and sixty-four cents for each call, which rarely took more than an hour to address.[59] Thus, although responsible for fire calls, they were free to pursue "whatever pleasurable pursuits, or personal duties, they cared for."[60]

Skidmore and the others subsequently alleged that they were entitled to overtime pay for all the time that they were "on-call."[61] Although an Interpretive Bulletin by the Administrator of the Department of Labor suggested otherwise, the district court found for the company, compelled by its view that "pursuing such pleasurable occupations or performing such personal chores does not constitute work."[62] On appeal, the U.S. Court of Appeals for the Fifth Circuit affirmed the decision, finding that "[c]ertainly plaintiffs [were] not entitled to recover overtime compensation for sleeping."[63] In doing so, the Fifth Circuit analogized the facts in the case to an example in the Interpretive Bulletin that it had concluded should apply.[64]

On appeal to the Supreme Court, Justice Robert H. Jackson, in a unanimous opinion, reversed the Fifth Circuit's decision.[65] He noted that Congress had vested responsibility to the court, not the agency, to "find facts and to determine in the first instance whether particular cases fall

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[55] *Id.* at 135.

[56] Skidmore v. Swift & Co., 53 F. Supp. 1020, 1020 (N.D. Tex. 1942), *aff'd* 136 F.2d 112 (5th Cir. 1943), *rev'd*, 323 U.S. 134 (1944).

[57] *Id.*

[58] *Skidmore*, 323 U.S. at 135. This fire hall was "equipped with steam heat and air-conditioned rooms" and with "sleeping quarters, a pool table, a domino table, and a radio." *Id.* at 136.

[59] *Id.* at 135–36. They were paid fifty cents per call from the effective date of the Fair Labor Standards Act through January 1, 1940, and then sixty-four cents after that. *Skidmore*, 53 F. Supp. at 1020–21.

[60] *Skidmore*, 53 F. Supp. at 1020–21.

[61] *Skidmore*, 323 U.S. at 135.

[62] *Skidmore*, 53 F. Supp. at 1021.

[63] Skidmore v. Swift & Co., 136 F.2d 112, 113 (5th Cir. 1943).

[64] *Id.*

[65] *Skidmore*, 323 U.S. at 140.

within or without the Act."[66] But this, he declared, did not obviate weighing the Administrator's "considerable experience in the problems of ascertaining working time in employments involving periods of inactivity."[67]

The *Skidmore* Court observed that in both informal ruling and interpretive bulletins, the Administrator had determined that a "flexible solution" was called for in order to determine what specific time periods, if any, of the inactive "on-call" time should be counted.[68] The Administrator also had opined in an amicus brief that although the precise facts of the case had not yet been addressed in the Bulletin, the general tests pointed to "the exclusion of sleeping and eating time of these employees from the workweek and the inclusion of all other on-call time."[69]

In the court's opinion, Justice Jackson specifically noted that no statutory provision established the degree of deference to be given to the Administrator.[70] Nonetheless, he recognized that because rulings, interpretations, and opinions are "are made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case," they were worthy of some respect.[71] Thus, "while not controlling upon the courts by reason of their authority, [they] do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."[72] Further, their weight would be determined according to "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[73] Accordingly, the case was remanded to the district court for determination of what "waiting time," if any, would be compensable.[74]

For the next forty years, *Skidmore* "enjoyed prominence as perhaps the Supreme Court's best expression of its policy of judicial deference toward many if not most agency interpretations of law."[75] Its ongoing vitality, however, was called into some doubt when the Supreme Court issued its landmark decision in *Chevron*.

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[66] *Id.* at 137.
[67] *Id.*
[68] *Id.* at 138.
[69] *Id.* at 139.
[70] *Id.*
[71] *Id.*
[72] *Id.* at 140.
[73] *Id.*
[74] *Id.*
[75] Hickman & Krueger, *supra* note 8, at 1236.

2. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.

The basic facts and holding in *Chevron* are well known and will be only cursorily described here. The Court in *Chevron* was called upon to determine the meaning of "stationary source" as that term was used in the Clean Air Act.[76] Pursuant to the statute, the EPA promulgated a regulation that allowed states "to adopt a plantwide definition of the term 'stationary source.'"[77] This allowed a plant to install or modify particular pollution-generating units at its facility without triggering onerous permit conditions so long as the change did not increase the total emissions from the plant.[78] The question, as framed by the Court, was whether the EPA's decision to group all these pollution-generating units "as though they were encased within a single 'bubble' [was] based on a reasonable construction of the statutory term 'stationary source.'"[79]

Justice John Paul Stevens, writing for a unanimous 6–0 Court, concluded that the EPA's regulation was reasonable, thereby rejecting the U.S. Court of Appeals for the District of Columbia Circuit's conclusion that the "bubble concept" conflicted with the Clean Air Act's purpose to improve air quality.[80] In the opinion, the Court established the familiar two-step test to analyze an agency's interpretation of a statute administered by that agency. Under the first step, a court looks to the statutory language to determine whether Congress has directly spoken on the question at issue.[81] If the statute's language is unambiguous, then the court's inquiry is at an end, and the agency's interpretation of the statutory provision is irrelevant.[82] But if the statute is silent or ambiguous, the court proceeds to a second step, where it determines whether the agency's interpretation is "based on a permissible construction of the statute."[83] If the interpretation is reasonable, then the interpretation is controlling.[84]

The *Chevron* Court specifically explained its justification for establishing a controlling deference standard for an agency's interpretation of a statute it administers. According to the Court, an agency is empowered to "fill the gap" through interpretation because Congress's grant of rulemaking authority to the agency creates the presumption "to

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[76] Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 840 (1984) (citing 40 C.F.R. § 51.18(j)(1)(i)–(ii) (1983)).

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *See id.* at 839, 841–42, 845 (concluding that the EPA's use of the bubble concept was a reasonable policy choice). Justices Marshall, Rehnquist, and O'Connor did not take part in the decision. *Id.* at 839.

[81] *Id.* at 842.

[82] *Id.* at 842–43.

[83] *Id.* at 843.

[84] *Id.* at 843–44.

make all policy choices within its sphere of delegated authority."[85] Because agencies possess greater political accountability than the courts,[86] and have unique expertise and experience to administer "technical and complex" regulatory programs,[87] administrative agencies are in the best position to make these tough policy choices.[88]

As demonstrated by its discussion in court opinions and legal scholarship, the *Chevron* test revolutionized the administrative state. And, at least initially, *Chevron*'s standard, which accepts reasonable agency interpretations of ambiguous statutes, was applied broadly to many types of agency interpretations of statutes.[89] Although the *Chevron* deference regime continues to evolve,[90] it remains one of the most significant doctrines in administrative law.

III. THE *SEMINOLE ROCK* STANDARD

The Supreme Court's seminal decision in *Bowles v. Seminole Rock & Sand Co.* announced a new standard under which courts must defer to an

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[85] Walker, *supra* note 4, at 1346–47.

[86] *See Chevron*, 467 U.S. at 865 ("While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices . . . .").

[87] *Id.*; Walker, *supra* note 4, at 1346–47.

[88] *See Chevron*, 467 U.S. at 865 (suggesting that an ambiguity or silence in the statute may have been a result of Congress's inability "to forge a coalition on either side of the question").

[89] *See*, *e.g.*, Massachusetts v. Morash, 490 U.S. 107, 116–17 (1989) (finding that the Secretary of Labor's view expressed in Notice of Proposed Rulemaking and subsequent regulation was entitled to *Chevron* deference); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 844 (1986) (according *Chevron* deference to the Commodity Futures Trading Commission's "long-held position that it has the power to take jurisdiction over counterclaims" in state reparation proceedings); Fed. Deposit Ins. Corp. v. Phila. Gear Corp., 476 U.S. 426, 438–39 (1986) (holding that the Federal Deposit Insurance Corporation's interpretation of a statutory provision was entitled to *Chevron* deference even though not contained in a regulation).

[90] For example, during the Supreme Court's 2000–2001 Term, a pair of decisions dramatically altered the doctrine and at the same time brought new vitality to *Skidmore*. In 2000, the Court decided *Christensen v. Harris County*, where it found that controlling deference under *Chevron* should not be afforded to an agency's interpretation of a statute that was expressed in an informal format, such as an opinion letter. 529 U.S. 576, 587 (2000). The following year, the Court decided *United States v. Mead Corp.*, where it similarly ruled a court should only grant an agency *Chevron* deference when the interpretation of a statute is authorized by Congress and carries with it the force of law. *See* 533 U.S. 218, 237 (2001) ("*Chevron* left *Skidmore* intact and applicable where statutory circumstances indicate no intent to delegate general authority to make rules with force of law, or where such authority was not invoked."). Taken together, these rulings mean that formal interpretations should be entitled to *Chevron* deference and informal interpretations should be reviewed under *Skidmore*. *Id.* Perhaps more importantly, however, and as some scholars were quick to observe, the decisions in *Christensen* and *Mead* raise a potential doctrinal inconsistency in the deference regimes that is not easily explained. *See* Anthony & Asimow, *supra* note 6, at 10 ("[The] Court repudiated strong deference for agency interpretations of ambiguous statutes contained in formats lacking the force of law, while apparently endorsing strong deference for agency interpretations of ambiguous regulations contained in such formats."). Although this question is beyond the scope of this Article, the Supreme Court may at some point have to reconcile this potential doctrinal inconsistency.

agency's interpretation of its regulation unless it "is plainly erroneous or inconsistent with the regulation."[91] This Part begins by reviewing the background and legal ruling in *Seminole Rock*. It next examines the legal justifications for granting controlling deference to an agency under the *Seminole Rock* doctrine, which was not adequately articulated by the Court until nearly fifty years later in two cases decided in the early 1990s.

A. Bowles v. Seminole Rock & Sand Co.

The striking principle that a court must defer to an agency's interpretation of its regulation unless the interpretation "is plainly erroneous or inconsistent with the regulation" had a modest beginning in a case decided in the midst of World War II.[92] In *Seminole Rock*, the Court was called upon to determine the "the proper interpretation and application of certain provisions of Maximum Price Regulation No. 188" under the Emergency Price Control Act of 1942.[93] The Act was enacted to curb wartime inflation, and the Maximum Price Regulation generally "brought the entire economy of the nation under price control."[94]

The "core" of the regulation at issue "was the requirement that each seller shall charge no more than the prices which he charged during the selected base period of March 1 to 31, 1942."[95] In January 1942, Seminole Rock & Sand "contracted to sell crushed stone to V. P. Loftis Co., a government contractor engaged in the construction of a government dam," at $1.50 per ton, as needed.[96] V. P. Loftis Co., however, could not use or store the stone until August 1942.[97] At that time, Seminole Rock & Sand delivered crushed stone for the original contract price of $1.50 per ton.[98] In the interim, Seminole Rock & Sand had contracted with Seaboard Air Line Railway and subsequently delivered it crushed stone in March 1942 at a price of sixty cents per ton.[99]

Seminole Rock & Sand later attempted to enter into additional contracts for crushed stone with Seaboard Air Line Railway for eighty cents and $1.00 per ton.[100] Chester Bowles, the Administrator of the Office of Price Administration, then sought to enjoin Seminole Rock & Sand from selling at a price higher than sixty cents per ton.[101] The lower

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[91] 325 U.S. 410, 414 (1945).
[92] *Id.* at 413–14.
[93] *Id.* at 411.
[94] *Id.* at 413.
[95] *Id.*
[96] *Id.* at 412.
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] *Id.*

court, however, found that Seminole Rock & Sand had not exceeded the highest price charged for its crushed stone during March 1942 and therefore had not violated the regulation.[102] It found that $1.50 per ton was "the highest price charged by respondent during March, 1942, and that this ceiling price had not been exceeded."[103] The Fifth Circuit affirmed this decision.[104]

On review to the Supreme Court, the issue for the Court was "to determine the highest price respondent charged for crushed stone" during the period in question, "within the meaning of Maximum Price Regulation No. 188."[105] The Court began by recognizing that the Administrator's interpretation was only relevant "if the meaning of the words used [in the regulation] is in doubt."[106] Next, should any ambiguity exist, it found that "a court must necessarily look to the administrative construction of the regulation."[107] With little fanfare or further elaboration, the Court then announced the standard that was to apply: "[T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation."[108]

After reviewing the regulation's language, the Court found that, irrespective of existing contracts for a higher price, the highest price of an actual delivery during March 1942 established the price ceiling.[109] And "[a]ny doubts concerning this interpretation . . . [were] removed by reference to the administrative construction" of the regulation.[110] The Court relied on a bulletin issued at the time the Maximum Price Regulation was issued, which had been made available to retailers and wholesalers.[111] Thus, the Court based its finding that the lower court erred on its own reading of the language of the regulation, as well as "the consistent administrative interpretation" set forth in the Bulletin regarding the ambiguous phrase "highest price charged during March, 1942."[112] And in reaching its conclusion, the Court placed considerable weight on the fact that other parties had been placed on notice of this consistent interpretation.[113] Overall, the Court performed a much more searching inquiry to ascertain the meaning of the regulation than the plain language of the test it purported to apply. In fact, it was only after it largely

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[102] *Id.* at 412–13.
[103] *Id.* at 413.
[104] *Id.*
[105] *Id.*
[106] *Id.* at 414.
[107] *Id.*
[108] *Id.*
[109] *Id.* at 415–16.
[110] *Id.* at 417.
[111] *Id.*
[112] *Id.* at 418.
[113] *Id.* at 417–18.

completed its own interpretive review of the regulation did it look to the agency's view to remove "[a]ny doubts concerning [the Court's] interpretation" of the Maximum Price Regulation.[114]

B. *A Doctrinal Explanation of* Seminole Rock

The Court in *Seminole Rock* did not provide an explicit justification for why an agency's interpretation of its regulation should receive controlling deference unless plainly erroneous or inconsistent with the regulation. In two cases decided in the early 1990s, however, the Court shed some light on the justification for the doctrine. In *Martin v. Occupational Safety and Health Review Commission*,[115] the Court suggested that, like *Chevron*, *Seminole Rock* deference is based on the agency's delegated lawmaking powers.[116] And in *Pauley v. BethEnergy Mines, Inc.*,[117] the Court observed that Congress's delegation necessarily entails the authority to interpret regulations and that this congressional delegation provides the basis for judicial deference.[118]

In *Martin*, the Court considered "the question to whom should a reviewing court defer when the Secretary of Labor and the Occupational Safety and Health Review Commission furnish reasonable but conflicting interpretations of an ambiguous regulation promulgated by the Secretary under the Occupational Safety and Health Act of 1970."[119] On review, the Supreme Court did not cite the *Seminole Rock* standard that an agency's interpretation of its own regulation should be upheld unless "plainly erroneous or inconsistent with the regulation."[120] Rather, it merely stated that it "is well established that an agency's construction of its own regulations is entitled to substantial deference."[121]

Specifically, it stated: "Because applying an agency's regulation to complex or changing circumstances calls upon the agency's unique expertise and policymaking prerogatives, we presume that the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers."[122] Thus, the Court found that an agency interpreting its own regulation was a "component" of Congress's delegation of lawmaking powers to an agency.

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[114] *Id.* at 417.

[115] 499 U.S. 144 (1991).

[116] *Id.* at 151.

[117] 501 U.S. 680 (1991).

[118] *Id.* at 698.

[119] *Martin*, 499 U.S. at 146 (citing Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 (1988)).

[120] Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945).

[121] *Martin*, 499 U.S. at 150 (quoting Lyng v. Payne, 476 U.S. 926, 939 (1986)) (internal quotation marks omitted).

[122] *Id.* at 151 (citing Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 566, 568 (1980)).

That same year, the Court similarly noted in *Pauley v. BethEnergy Mines* that controlling deference was a product of the same rationale as the *Chevron* doctrine:

> As delegated by Congress, then, the Secretary's authority to promulgate interim regulations "not . . . more restrictive than" the HEW interim regulations necessarily entails the authority to interpret HEW's regulations and the discretion to promulgate interim regulations based on a reasonable interpretation thereof. From this congressional delegation derives the Secretary's entitlement to judicial deference.[123]

These decisions suggest that *Seminole Rock* deference is similarly grounded in an implicit delegation from Congress. And this doctrinal underpinning will have implications in Part IV, when proposing the proper level of deference to be accorded to the interpretation of regulations.

IV. THE DEVELOPMENT OF THE *SEMINOLE ROCK* DOCTRINE

With this framework now firmly in place, this Part explores the major cases where the Court has invoked the *Seminole Rock* doctrine.[124] This analysis discusses the varied articulations of the standard employed by the Court over the past sixty years. It shows that, despite the lack of explicit factors set forth in the *Seminole Rock* standard, the Court has consistently considered certain issues when applying the standard. These include, most prominently, whether the agency's interpretation has been consistent over time, whether the agency stated a contrary intent when it originally promulgated the regulation, and the format in which the agency has expressed its interpretation.[125]

Since the Court's decision in *Seminole Rock* in 1945, members of the Court have cited it nearly thirty times for the general proposition that the agency's interpretation is to be given "controlling weight unless it is plainly erroneous or inconsistent with the regulation."[126] But even so, the

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[123] 501 U.S. 680, 698 (1991) (alteration in original); *see also* Angstreich, *supra* note 4, at 96–99 (suggesting that the Court in *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359 (1998), adopted a background principle that the controlling deference to agency interpretation of its regulations is a necessary component to its authority to promulgate regulations).

[124] The Court has confronted the issue of an agency's interpretation of its own regulation in many cases where it did not explicitly rely upon or invoke *Seminole Rock*. *See supra* note 42. The benefit of an examination where *Seminole Rock* was actually invoked is to allow an analysis of the factors and considerations the Court deemed worthy of explicit consideration and of the development of the doctrine as a whole, as expressed and applied by the Court.

[125] These factors become the basis of a new approach proposed in Part V.

[126] Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 171 (2007); Gonzales v. Oregon, 546 U.S. 243, 284 (2006) (Scalia, J., dissenting); Ballard v. Comm'r of Internal Revenue, 544 U.S. 40, 70 (2005) (Rehnquist, C.J., dissenting); Christensen v. Harris Cnty., 529 U.S. 576, 588 (2000); *Allentown Mack Sales & Serv.*, 522 U.S. at 390 (Breyer, J., dissenting); Auer v. Robbins, 519 U.S. 452, 461

Court has set forth differing articulations of the *Seminole Rock* doctrine. These cases have been analyzed and categorized below according to several general trends.

These categories show that, in a sense, the Court has come full circle. Its approach to the deference question began with an expressed standard that suggested an almost unbridled respect for the agency's interpretation of its regulation. And while the Court struggled over decades to strike a balance between deference and accountability, it ultimately reached approximately the same place from which it departed: an agency's interpretation of a regulation will carry the day unless it is plainly erroneous, with little real regard for such considerations as the agency's stated intent when promulgating the regulation, its prior interpretation on that regulation, or the manner in which that interpretation has been expressed. But this too, may soon change again due to the Court's recent and new found interest in the doctrine.

A. *The Early Years (1945–1970)*

Although *Seminole Rock* was decided in 1945, its standard was not cited by the Supreme Court until 1955 in *Peters v. Hobby*.[127] And even in that opinion, it appeared only in the dissenting opinion of Justice Stanley Reed and was cited without any analysis or specifics with respect to its standard.

In *Peters*, the Court reviewed the petitioner's assertion that his "removal and debarment from federal employment were invalid."[128] At

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(1997); Morse v. Republican Party, 517 U.S. 186, 201 (1996); Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 103 (1995) (O'Connor, J., dissenting); Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994); *id*. at 519 (Thomas, J., dissenting); Dir., Office of Workers' Comp. Programs v. Greenwich Collieries, 512 U.S. 267, 297 (1994) (Souter, J., dissenting); Sec. Servs., Inc. v. Kmart Corp., 511 U.S. 431, 436 (1994); Stinson v. United States, 508 U.S. 36, 44 (1993); Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989) (Brennan, J., concurring); Mullins Coal Co. v. Dir., Office of Workers' Comp. Programs, 484 U.S. 135, 159 (1987); *id.* at 170 (Marshall, J., dissenting); Jean v. Nelson, 472 U.S. 846, 865 (1985) (Marshall, J., dissenting); United States v. Swank, 451 U.S. 571, 589 (1981) (White, J., dissenting); *Ford Motor Credit Co.*, 444 U.S. at 566; United States v. Larionoff, 431 U.S. 864, 872 (1977); N. Ind. Pub. Ser. Co. v. Porter Cnty. Chapter of the Izaak Walton League of Am., Inc., 423 U.S. 12, 15 (1975); Ehlert v. United States, 402 U.S. 99, 105 (1971); United States v. Chicago, 400 U.S. 8, 10 (1970); INS v. Stanisic, 395 U.S. 62, 72 (1969); Thorpe v. Hous. Auth. of Durham, 393 U.S. 268, 276 (1969); Udall v. Tallman, 380 U.S. 1, 16–17 (1965); Peters v. Hobby, 349 U.S. 331, 355 (1955) (Reed, J., dissenting); *see also* Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan, 555 U.S. 285, 295–96 (2009) (citing *Auer*); Fed. Express Corp. v. Holowecki, 552 U.S. 389, 397 (2008) (same); Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 672 (2007) (same); *Long Island Care at Home*, 551 U.S. at 171 (2007) (same).

[127] *Peters*, 349 U.S. at 355 (Reed, J., dissenting). A citation to *Seminole Rock* first appeared in 1946 in *M. Kraus & Bros. v. United States*, but it was relied upon for the general proposition that challenges to the Price Administrator's authority under the Emergency Price Control Act must "be raised initially in a proceeding before the Emergency Court of Appeals." 327 U.S. 614, 622 (1946).

[128] *Peters*, 349 U.S. at 333. Dr. John P. Peters was a professor of medicine at Yale University and

issue was an interpretation by the Board of Inquiry on Employee Loyalty of the Federal Security Agency.[129] Justice Reed cited *Seminole Rock* (along with several other cases) in his dissent: "Such reasonable interpretation promptly adopted and long-continued by the President and the Board should be respected by the courts. That has been judicial practice heretofore."[130] Despite not quoting the precise standard language of *Seminole Rock*, his invocation of the case is noteworthy because he considered that it was significant that the Board's interpretation had been "promptly adopted" and the agency had adhered to this view over time.[131]

It was another ten years before *Seminole Rock* appeared again—this time in a majority opinion. Thus, it took twenty years for the *Seminole Rock* standard to be relied upon by a majority of the Justices. In its 1965 decision in *Udall v. Tallman*,[132] the Court reviewed "the effect of Executive Order No. 8979 and Public Land Order No. 487 upon the Secretary of the Interior's authority to issue oil and gas leases."[133] The respondents challenged the decision by the Secretary to award approximately 25,000 acres in the Kenai National Moose Range in Alaska to a different set of parties.[134] According to the respondents, although these other parties had filed their applications earlier, those applications were premature because the lands in question were not eligible to be leased because of the land's status as a wildlife refuge.[135] In granting the leases to the original lessees, the Secretary construed both the executive order and his land order to provide no bar to oil and gas leases on lands that had been designated as wildlife refuges, such as the Moose Range.[136]

On appeal, the U.S. Court of Appeals for the District of Columbia Circuit determined that the executive order in question (which had created the Moose Range) and the subsequent public land order "had withdrawn the lands in controversy from availability under the Mineral Leasing Act, and that the lands remained closed to leasing until they were reopened by a revised departmental regulation."[137] Therefore, the court concluded that the applications of the prior parties were ineffective, and the leases that had been originally issued to them were void.[138]

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was employed as a Special Consultant in the United States Public Health Service of the Federal Security Agency. *Id.*

[129] *Id.* at 333–34.

[130] *Id.* at 355 (Reed, J., dissenting).

[131] *Id.*

[132] 380 U.S. 1 (1965).

[133] *Id.* at 2.

[134] *Id.* at 2–3.

[135] *Id.*

[136] *Id.* at 4.

[137] *Id.* at 3.

[138] *Id.*

The Supreme Court reversed.[139] In ruling for the original lessees, the Court cited *Seminole Rock*'s "plainly erroneous or inconsistent standard."[140] But the Court's analysis was much more extensive than one would have expected under such a deferential standard. In fact, the Court devoted nearly twenty pages of its opinion to analysis of the Mineral Leasing Act, the applicable regulations, and even the legislative history of the Act.[141] And of special significance to the Court was its view that the Secretary had "consistently construed" the orders at issue and that his "interpretation [had] been made a repeated matter of public record."[142] Furthermore, the Court noted that, unlike the respondents, the original leases had "been developed in reliance upon the Secretary's interpretation."[143]

The early years of the doctrine were thus notable not for what the Court did do, but rather for what it did not do. In fact, two decades elapsed before a majority of the Court even applied the *Seminole Rock* doctrine in one of its cases. Apart from its decision in *Udall v. Tallman*, where it considered both the consistency of the agency's position and whether there had been reliance interests at stake,[144] the Court merely cited to the case a handful of times with no real inquiry.[145]

B. *The 1970s and 1980s: Confusion and Inconsistency*

During the 1970s and 1980s, the opinions in which the Court cited *Seminole Rock* did not elaborate further on the standard or specify a precise analysis that was required. This period generally can be characterized as one of doctrinal confusion and inconsistency.

The first example is *Ehlert v. United States*.[146] At issue in *Ehlert* was "whether a Selective Service local board must reopen the classification of a registrant who claims that his conscientious objection to war in any form crystallized between the mailing of his notice to report for induction and

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[139] *Id.* at 4.

[140] *Id.* at 17 (quoting Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 413–14 (1945)).

[141] *Id.* at 4–23.

[142] *Id*. at 4. As the Court held nearly twenty years later in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984), the *Udall* Court likewise found that "[t]he Secretary's interpretation may not be the only one permitted by the language of the orders, but it is quite clearly a reasonable interpretation [and] courts must therefore respect it," 380 U.S. at 4.

[143] *Udall*, 380 U.S. at 4.

[144] *Id*.

[145] *See* INS v. Stanisic, 395 U.S. 62, 72 (1969) ("[T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." (alteration in original)); Thorpe v. Hous. Auth. of Durham, 393 U.S. 268, 276 (1969) (same); *see also* United States v. Chicago, 400 U.S. 8, 10 (1970) ("We defer on this issue to the definition of 'train' given by the administrative agency which has oversight of the problem.").

[146] 402 U.S. 99 (1971).

his scheduled induction date."[147] The local board had refused to reopen William Ehlert's classification because it found that his new anti-war view "did not constitute the 'change in the registrant's status resulting from circumstances over which the registrant had no control'" as required under a Selective Service regulation.[148]

As it had done originally in *Seminole Rock*, the Court looked first to whether the regulation was ambiguous.[149] Because "the meaning of the language [was] not free from doubt," the Court found it was "obligated to regard as controlling a reasonable, consistently applied administrative interpretation if the Government's be such."[150] It cited *Seminole Rock* for this standard.[151] The Court concluded that "[t]he Government's interpretation is a plausible construction of the language of the actual regulation, though admittedly not the only possible one."[152] Thus, at least in this case, the Court viewed the *Seminole Rock* standard to require an agency's interpretation to be both "reasonable [and] consistently applied."[153]

A similar recharacterization of the *Seminole Rock* standard appeared several years later in *Northern Indiana Public Service Co. v. Walton League*.[154] In that case, the Court again relied upon *Seminole Rock*, noting that the interpretation in question "sensibly conforms to the purpose and wording of the regulations."[155] The Court, however, repeated *Ehlert*'s formulation that controlling deference was appropriate only where the interpretation was "reasonable" and "consistently applied."[156]

This pattern of citing *Seminole Rock*, but articulating a slightly different standard than the original opinion, continued well into the next decade.[157] For example, in reaching the conclusion that deference to the

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[147] *Id.* at 100.
[148] *Id.* (quoting 32 C.F.R. § 1625.2 (1971)).
[149] *Id.* at 104.
[150] *Id.* at 105.
[151] *Id.*
[152] *Id.*
[153] *Id.*
[154] 423 U.S. 12 (1975).
[155] *Id.* at 15.
[156] *Id.* (quoting *Ehlert*, 402 U.S. at 105).
[157] *See, e.g.*, United States v. Swank, 451 U.S. 571, 589 (1981) (White, J., dissenting) ("The [Internal Revenue] Service's interpretation of its own regulation is entitled to deference."); Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 566 (1980) ("The Court has often repeated the general proposition that considerable respect is due [to] the interpretation given [a] statute by the officers or agency charged with its administration. An agency's construction of its own regulations has been regarded as especially due that respect." (second alteration in original) (citations omitted) (internal quotation marks omitted)). In *Jean v. Nelson*, 472 U.S. 846 (1985), the first post-*Chevron* case in which *Seminole Rock* appears, Justice Marshall observed in his dissent that "an agency's interpretation of its own regulations is 'of controlling weight unless it is plainly erroneous or inconsistent with the regulation,'" *Id.* at 865 (Marshall, J., dissenting) (quoting Bowles v. Seminole Rock & Sand Co., 325

agency was warranted, the Court in *Mullins Coal Co. v. Director, Office of Workers' Compensation Programs*,[158] stated that "the Secretary's view is not only eminently reasonable but also is strongly supported by the fact that [the Department of] Labor wrote the regulation."[159] Quoting *Seminole Rock*, the Court recognized that the agency's interpretation was "deserving of substantial deference unless it [was] plainly erroneous or inconsistent with the regulation."[160] But the Court noted in its analysis that the interpretation at issue "ha[d] been, with one exception, consistently maintained through Board decisions."[161]

Dissenting in *Mullins Coal*, Justice Marshall observed that the Court was "correct that the agency's interpretation of its own regulations is entitled to deference," but he cautioned that "deference has its bounds" and that *Seminole Rock* deference was "not a license for an agency effectively to rewrite a regulation through interpretation."[162] In his view, the agency's interpretation was "contrary to the plain language of the regulation, conflict[ed] with comments of the Secretary accompanying the final promulgation of the regulation, and create[d] an unnecessarily complex regulatory scheme."[163] Therefore, he viewed "the agency's interpretation as plainly inconsistent with the regulatory language and history," and would not have deferred as the majority was willing to do.[164]

In this line of cases, the Court failed to cite *Seminole Rock* with precision. Moreover, its analyses were not necessarily consistent with the precise standard it was applying, at least as it was originally announced. Nonetheless, the Justices did consistently consider several key factors—including reasonableness and consistency—when applying the standard. In addition, Justice Marshall's consideration of the agency's original comments when it promulgated the regulation in his *Mullins Coal* dissent foreshadowed a new factor that the Court would explicitly adopt the following year.

C. *A New Standard:* Gardebring v. Jenkins *and* Thomas Jefferson University v. Shalala

A significant change to the *Seminole Rock* standard emerged in 1988 in *Gardebring v. Jenkins*,[165] a holding that was reaffirmed six years later in

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U.S. 410, 414 (1945)).

[158] 484 U.S. 135 (1987).

[159] *Id.* at 159.

[160] *Id.* (quoting *Seminole Rock*, 325 U.S. at 414) (internal quotation marks omitted).

[161] *Id.*

[162] *Id.* at 170 (Marshall, J., dissenting) (citing *Seminole Rock*, 325 U.S. at 414).

[163] *Id.*

[164] *Id.*

[165] 485 U.S. 415 (1988). In other cases throughout the remainder of the 1980s and beginning of the 1990s, the Court remained faithful to its original articulation of the *Seminole Rock* standard. *See,*

Thomas Jefferson University v. Shalala.[166] In these two cases, the Court found that the *Seminole Rock* deference analysis required consideration of the original intent of the agency when it promulgated the regulation at issue.

On review in *Gardebring* was the U.S. Court of Appeals for the Eighth Circuit's decision that the Minnesota Department of Human Services (under Commissioner Sandra Gardebring) had violated a federal regulation issued by the U.S. Department of Health and Human Services (HHS).[167] The Eighth Circuit had found that in this case the regulation required that the agency give written notice to the respondent (Kathryn Jenkins) before suspending her benefits for a certain period of time.[168] The Supreme Court disagreed.

Writing for the majority, Justice Stevens concluded that this "notice provision requires only that general program information be available, in 'written form' and 'orally as appropriate.'"[169] Although conceding that "it would be wise (assuming that it were feasible and not too expensive) to precede every such change with adequate advance notice," the Court found that the plain language of the regulation did "not unambiguously impose any such requirement on state welfare agencies."[170]

With respect to the lower court's determination that the state agency was "required . . . to prepare a written notice that adequately explained the lump-sum policy and to distribute it to all current [aid] recipients and all future applicants," the Court considered the view of the HHS Secretary.[171] The Court noted that the Secretary, who was responsible for enforcing the regulation, believed that "it [was] generally appropriate to rely on an oral explanation of the consequences of receiving a lump-sum payment when the recipient report[ed] it to the family's caseworker."[172]

When determining whether to accept the federal agency's interpretation, the Court recognized that "the Secretary had not taken a

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e.g., Sec. Servs., Inc. v. Kmart Corp., 511 U.S. 431, 436 n.2 (1994) (adhering to *Seminole Rock*'s "plainly erroneous or inconsistent with the regulation" standard); Stinson v. United States, 508 U.S. 36, 45 (1993) (same); Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989) (same); *see also* Dir., Office of Workers' Comp. Programs v. Greenwich Collieries, 512 U.S. 267, 297 (1994) (Souter, J., dissenting) (asserting that the "Department of Labor is entitled to 'substantial deference' in the interpretation of its own regulations," so long as such interpretation is "reasonable in light of the regulations' text and purpose").

[166] 512 U.S. 504 (1994).

[167] *Gardebring*, 485 U.S. at 417–18.

[168] An amendment to the Aid to Families with Dependent Children (AFDC) Program provided that "a family receiving nonrecurring lump-sum income" was ineligible for benefits for a certain time period after it received that payment. *Id.* at 417 (citing Omnibus Budget Reconciliation Act of 1981, 42 U.S.C. § 602(a)(17) (1982)).

[169] *Id.* at 429 (quoting 45 C.F.R. § 233 (1987)).

[170] *Id.* at 429 n.15.

[171] *Id.* at 421, 429.

[172] *Id*. at 429.

position on this question until this litigation," but the Court nonetheless deferred:

> [W]hen it is the Secretary's regulation that we are construing, and when there is no claim in this Court that the regulation violates any constitutional or statutory mandate, we are properly hesitant to substitute an alternative reading for the Secretary's unless that alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation.[173]

This marked a significant change to the Court's formulation of the *Seminole Rock* standard: a court must defer unless "the regulation's plain language" dictates otherwise, or a different interpretation is compelled by "other indications" of an agency's intent at the time it promulgated the regulation.[174] Notably, seven Justices (including two in partial dissent) endorsed this formulation.[175]

A separate opinion by Justice Sandra Day O'Connor explicitly agreed with this new formulation.[176] Justice O'Connor, joined by Justice Brennan, however, "disagree[d] with the Court's application" because the agency had taken "two inconsistent positions" during the litigation.[177] Because she regarded the agency's earlier position as "far more reasonable," she would have held the agency to its "earlier and better interpretation."[178] Thus, these Justices viewed the fact that the agency had previously interpreted the regulation (presumably at the time of its promulgation) differently than it did during the litigation as dispositive.[179]

Several years later in *Thomas Jefferson University v. Shalala*, the Court reinforced that the *Gardebring* standard represented an accurate formulation of the *Seminole Rock* standard.[180] At issue in *Thomas Jefferson University* was a Medicare regulation that prohibited reimbursement of certain educational activities borne by hospitals.[181] The HHS Secretary interpreted the regulation "to bar reimbursement of

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[173] *Id.* at 430. Ms. Jenkins had not argued that the agency's regulation, as interpreted by the agency, violated the statute or that it violated her constitutional rights, such as due process. *Id.*

[174] *Id.*

[175] *Id.* at 416. Justice Kennedy took no part in the consideration or decision in the case, and Justice Marshall only joined the last paragraph of Justice O'Connor's opinion. *Id.* at 432 (O'Connor, J., concurring in part and dissenting in part).

[176] *Id.*

[177] *Id.* at 432–33.

[178] *Id.* at 435.

[179] *Id.* It is not clear from Justice O'Connor's opinion whether the agency had indeed stated the "better" interpretation at the time that it had originally promulgated the regulation. *Id.*

[180] Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994).

[181] *Id.* at 506 (citing 42 C.F.R. § 413.85(c) (1993)).

educational costs that were borne in prior years not by the requesting hospital, but by the hospital's affiliated medical school."[182]

Although the Court initially phrased the question as "whether the Secretary's interpretation is a reasonable construction of the regulatory language," the Court quoted *Seminole Rock* and stated that the agency's interpretation must be given "controlling weight unless it is plainly erroneous or inconsistent with the regulation."[183] The Court next repeated *Gardebring*'s formulation to explain the *Seminole Rock* standard: "In other words, we must defer to the Secretary's interpretation unless an 'alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation.'"[184]

In deferring to the Secretary, the Court found that the agency's interpretation was "far more consistent" with the regulation than the petitioner's interpretation.[185] But the Court noted that it did not matter because "even if this were not so, the Secretary's construction is, at the very least, a reasonable one, and we are required to afford it 'controlling weight.'"[186] Likewise, the Court rejected the argument that the interpretation should be rejected on the basis that it conflicted with a past interpretation. The Court acknowledged that "it is true that an agency's interpretation of a statute or regulation that conflicts with a prior interpretation is 'entitled to considerably less deference' than a consistently held agency view.'"[187] But it found that "because petitioner fail[ed] to present persuasive evidence that the Secretary ha[d] interpreted the anti-redistribution provision in an inconsistent manner," the maxim did not apply.[188] A majority of the Court deferred to the agency's interpretation.[189]

Significantly, four Justices in dissent expressed their concern with the *Seminole Rock* doctrine and would not have deferred to the agency's interpretation.[190] Justice Thomas, joined by Justices Stevens, O'Connor, and Ginsburg, asserted that granting an agency the power to "self-interpret" its own regulation was in stark tension with an agency's responsibility to resolve statutory ambiguities.[191] In Justice Thomas's view, "the Secretary ha[d] merely replaced statutory ambiguity with

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[182] *Id.*
[183] *Id.* at 506, 512 (quoting Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945)).
[184] *Id.* at 512 (quoting *Gardebring*, 485 U.S. at 430).
[185] *Id.* at 515.
[186] *Id.* (quoting *Seminole Rock*, 325 U.S. at 414).
[187] *Id.* (quoting INS v. Cardoza-Fonseca, 480 U.S. 421, 446 n.30 (1987)).
[188] *Id.*
[189] *Id.* at 518.
[190] *Id.* (Thomas, J., dissenting).
[191] *Id.*

regulatory ambiguity."[192] He opined that by giving "effect to such a hopelessly vague regulation, the Court disserves the very purpose behind the delegation of lawmaking power to administrative agencies, which is to resol[ve] . . . ambiguity in a statutory text."[193]

Justice Thomas recognized that it was "perfectly understandable, of course, for an agency to issue vague regulations, because to do so maximizes agency power and allows the agency greater latitude to make law through adjudication rather than through the more cumbersome rulemaking process."[194] But he warned that such authority undermines the notice and comment procedures in the APA: "[A]gency rules should be clear and definite so that affected parties will have adequate notice concerning the agency's understanding of the law."[195] Consequently, he would not have deferred and would have found that the Secretary's interpretation violated the APA.[196]

With the original stated intent of the agency now grafted onto the *Seminole Rock* standard—and with several members of the Court clearly anxious about the ramifications of controlling deference in these circumstances—*Gardebring* and *Thomas Jefferson University* reflected the appropriate test for courts to determine whether or not to defer to an agency interpreting its own regulation.[197] This new "test," however, was short lived.

D. Auer v. Robbins*: A Return to* Seminole Rock*'s Original Formulation*

In 1997, the Court reverted to its original formulation in *Seminole Rock*, eliminating any mention of the intent of the agency. In *Auer v. Robbins*,[198] the Court's unanimous opinion displayed an open willingness to defer to the agency's interpretation of its own regulation with no real inquiry as to factors considered by the Court in the prior two decades.[199]

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[192] *Id.* at 525.

[193] *Id.* (alterations in original) (quoting Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 696 (1991)).

[194] *Id.*

[195] *Id.* Justice Thomas quoted Kenneth Culp Davis and Richard J. Pierce's treatise on administrative law for analogous support. *See id.* ("An agency whose powers are not limited either by meaningful statutory standards or . . . legislative rules poses a serious potential threat to liberty and to democracy." (quoting 2 KENNETH CULP DAVIS & RICHARD J. PIERCE, ADMINISTRATIVE LAW § 11.5 (3d ed. 1994))).

[196] *Id.* at 529–30 (citing 42 C.F.R. § 413.85(a), (c), (g) (1993)).

[197] *See also* Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 108, 110–11 (1995) (O'Connor J., dissenting) (stating that although she took seriously the Court's "obligation to defer to an agency's reasonable interpretation of its own regulations, ... [a]n agency is bound by the regulations it promulgates and may not attempt to circumvent the amendment process through substantive changes recorded in an informal policy manual that are unsupported by the language of the regulation").

[198] 519 U.S. 452 (1997).

[199] *See id.* at 461 (delineating that the deferential standard was met using the Secretary's creation

At issue in *Auer* was the Secretary of Labor's interpretation of both statutory language and regulatory language.[200] The petitioners, including Sergeant Francis Bernard Auer, were officers employed by the St. Louis Police Department.[201] They brought suit against the St. Louis Board of Police Commissioners, including Commissioner David A. Robbins, for overtime pay that they alleged was owed to them under the Fair Labor Standards Act of 1938 (FLSA).[202]

The Board claimed that the officers were exempted from overtime pay eligibility because they were "bona fide executive, administrative, or professional" employees.[203] Such employees are not eligible for overtime pay under the FLSA.[204] In support of its view, the Board relied on a regulation issued by the Secretary of Labor. This regulation set up a "salary-basis" test to determine whether a public-sector employee is a "bona fide" employee (i.e., a salaried employee) under the regulation.[205] Under the regulation:

> An employee will be considered to be paid "on a salary basis". . . if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed.[206]

The Secretary interpreted this to mean that if an employee's "compensation may 'as a practical matter' be adjusted in ways inconsistent with the test," the employee is not "on salary" and thus is eligible for overtime pay.[207]

The officers contended that their duties were not "of an executive, administrative, or professional nature."[208] And even if their duties were of such nature, they argued that, because their pay was subject to reduction for various disciplinary infractions related to the "quality or quantity" of their work, they were therefore not salaried employees under the salary-basis test.[209]

In determining whether the officers were salaried employees, the Court focused on whether "an employee's pay is 'subject to' disciplinary or other

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of the salary-basis test).

[200] *Id.* at 454.

[201] *Id.* at 455.

[202] *Id.*

[203] *Id.*

[204] *Id.* at 454.

[205] *Id.* at 455 (citing 29 C.F.R. §§ 541.1(f), 541.2(e), 541.3(e) (1996)).

[206] *Id.* (alterations in original) (citing 29 C.F.R. § 541.118(a)).

[207] *Id.* at 454–55.

[208] *Id.* at 455 (citing 29 C.F.R. §§ 541.1(a)–(e), 541.2(a)–(d), 541.3(a)–(d)).

[209] *Id.*

deductions whenever there exists a *theoretical* possibility of such deductions, or rather only when there is something more to suggest that the employee is *actually* vulnerable to having his pay reduced."[210] The officers argued that, according to their police manual, all department employees are theoretically subject to disciplinary deductions in pay, even including the sergeants; therefore, they are "subject to" such deductions and hence non-exempt under the FLSA.[211]

At the request of the Court, the U.S. Solicitor General filed an amicus brief offering the Secretary of Labor's view on the salary-basis test.[212] According to the Secretary, the salary-basis test denied exempt status to employees who are "covered by a policy that permits disciplinary or other deductions in pay 'as a practical matter.'"[213] Thus, "if there is either an actual practice of making such deductions or an employment policy that creates a 'significant likelihood' of such deductions," then an employee did not have salaried status.[214]

Relying on and directly quoting the *Seminole Rock* standard, the Court noted that "[b]ecause the salary-basis test is a creature of the Secretary's own regulations, his interpretation of it is . . . controlling unless 'plainly erroneous or inconsistent with the regulation.'"[215] Based on this deferential standard, the Court found the burden "easily met."[216] Indeed, citing both the American Heritage Dictionary and Webster's New International Dictionary, the Court simply stated that the "critical phrase 'subject to' comfortably bears the meaning the Secretary assigns."[217] Because there was an actual practice, and no significant likelihood of such deductions, the Court affirmed the lower court's decision.[218]

Justice Scalia's opinion for the Court in *Auer* is important because it marked a return to prior cases where the Court engaged in a rather mechanical application of the *Seminole Rock* standard.[219] The Court

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[210] *Id.* at 459 (emphases added).

[211] *Id.* at 455.

[212] *Id.* at 453, 461.

[213] *Id.* at 461.

[214] *Id.*

[215] *Id.* (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989) and Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945)).

[216] *Id.*

[217] *Id.*

[218] *Id.*

[219] The Court's decision is important for another reason. The officers had protested that the Secretary's interpretation of its regulation was presented during the litigation and in a legal brief, and therefore was not worthy of deference. *Id.* at 464. The Court, however, summarily ruled that the Secretary's interpretation was not a "*post hoc* rationalization." *Id.* at 462 (quoting Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212 (1988) (internal brackets omitted)). It simply stated: "There is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." *Id.* The Court provided no explanation or further reasoning for this conclusion.

declined to engage in a searching review of the Secretary's interpretation. Nor did it determine whether there were other indications of the Secretary's intent at the time of the regulation's promulgation that would compel a different view than the Secretary's or any other factors such as whether it was consistently applied.

E. Gonzales v. Oregon*: A Brief Return to Intent*

In its 2006 decision in *Gonzales v. Oregon*,[220] the Court briefly returned to its pre-*Auer* decisions where the Court performed a more searching inquiry into whether controlling deference was appropriate.[221] Moreover, it resurrected one factor previously applied in *Gardebring* and *Thomas Jefferson University*, and also created a new "exception" that limited when controlling deference is due under *Seminole Rock*.

At issue in *Gonzales* was whether the Controlled Substances Act (CSA) authorized the U.S. Attorney General to "prohibit doctors from prescribing regulated drugs for use in physician-assisted suicide, notwithstanding a state law permitting the procedure."[222] The Attorney General had issued an interpretive rule that addressed the implementation and enforcement of the CSA as it applied to the State of Oregon's enactment of the Oregon Death with Dignity Act (ODWDA).[223]

The United States argued that the interpretive rule was an elaboration of one of its regulations and therefore entitled to controlling deference under the *Seminole Rock* standard as elaborated upon in *Auer*.[224] This interpretive rule, however, essentially parroted much of the statute:

> [A]ssisting suicide is not a "legitimate medical purpose" within the meaning of 21 CFR 1306.04 (2001), and that prescribing, dispensing, or administering federally controlled substances to assist suicide violates the Controlled Substances Act. Such conduct by a physician registered to dispense controlled substances may "render his registration . . . inconsistent with the public interest" and therefore subject to possible suspension or revocation under

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[220] 546 U.S. 243 (2006).

[221] *Id.* at 249. In the time between the *Auer* and *Gonzales* decisions, the Court cited to *Auer* twelve times. Restricted *Shepard's* Report for *Auer v. Robbins*, LEXIS ADVANCE, https://advance.lexis.com (search "519 U.S. 452" in "Cases"; when the *Auer* decision appears, select "*Shepardize*"; then select "Citing Decisions" at the top of the results page; then select "U.S. Supreme Court" from Court menu on left side of the page; then narrow timeline to 1997–2006). Many were simply decisions remanding the case in light of *Auer*. The other cases, as a general matter, remained faithful to the *Auer* formulation and analysis.

[222] *Gonzales*, 546 U.S. at 248–49 (citing Controlled Substances Act, 21 U.S.C. § 801 (2000)).

[223] *Id.* at 249 (citing ORE. REV. STAT. §§ 127.800–127.990 (2003)).

[224] *Id.* at 256 (citing 21 C.F.R. § 1306.04 (2005)).

21 U.S.C. 824(a)(4).[225]

Although the Court recognized that "[a]n administrative rule may receive substantial deference if it interprets the issuing agency's own ambiguous regulation," it declined to extend that deference here.[226] Because the language addressed in the interpretive rule "comes from Congress, not the Attorney General," the Court held that deference was not warranted.[227]

More specifically, according to the Court, the rule's repetition of statutory phrases, such as "legitimate medical purpose" and "in the course of professional practice," shed no light on "a central issue in this case: Who decides whether a particular activity is in 'the course of professional practice' or done for a 'legitimate medical purpose'?"[228] Therefore, because "the regulation gives no indication how to decide this issue, the Attorney General's effort to decide it now" through his interpretive rule "cannot be considered an interpretation of the regulation."[229] Summing up, the Court observed that "[a]n agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language."[230] And, "[s]imply put, the existence of a parroting regulation does not change the fact that the question here is not the meaning of the regulation but the meaning of the statute."[231] This holding thus established the aptly-named "anti-parroting" exception to *Seminole Rock* deference.[232]

And if these were not reasons enough, the Court offered another for its conclusion. Because the Attorney General's current interpretation could not "be justified as indicative of some intent the Attorney General had in 1971" when the regulation was promulgated, the Court also found deference was not in order.[233] In fact, quoting *Thomas Jefferson*

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[225] *Id.* at 254 (alterations in original); *see* 21 U.S.C. § 824(a)(4) (2006) (explaining how the Attorney General may deny, suspend, or revoke a physician's registration if it is "inconsistent with the public interest").

[226] *Gonzales*, 546 U.S. at 255 (citing Auer v. Robbins, 519 U.S. 452, 461–63 (1997)).

[227] *Id.* at 257; *see* Stephen M. Johnson, *Bringing Deference Back (but for How Long?): Justice Alito,* Chevron*,* Auer*, and* Chenery *in the Supreme Court's 2006 Term*, 57 CATH. U. L. REV. 1, 32 (2007) (explaining the evolution of various levels of deference afforded by the Court to administrative agencies).

[228] *Gonzales*, 546 U.S. at 257.

[229] *Id.*

[230] *Id.*

[231] *Id.*

[232] *Id.* Justice Scalia, joined by Chief Justice Roberts and Justice Thomas, dissented. Relying heavily upon the *Seminole Rock* standard, they argued that the Attorney General's interpretation was "clearly valid, given the substantial deference [the Court] must accord it." *Id.* at 275 (Scalia, J., dissenting). They also questioned the majority's creation of the exception for interpretations that merely "restate the terms of the statute itself" as finding no support in *Auer v. Robbins*. *Id.* at 277.

[233] *Id.* at 258 (majority opinion).

University, it found: "That the current interpretation runs counter to the 'intent at the time of the regulation's promulgation' is an additional reason why [*Seminole Rock*/]*Auer* deference is unwarranted."[234]

The Court's decision in *Gonzales* was therefore important to the development of the *Seminole Rock* doctrine for two reasons. First, it marked the return of an analysis of the agency's stated intent at the time the regulation in question was promulgated when applying the *Seminole Rock* analysis. Second, it created the "anti-parroting" exception to the *Seminole Rock* test.

F. *Post*-Gonzales *(2006 to Mid-2011): Back to* Seminole Rock

From 2006 (when *Gonzales* was decided) until mid-2011, the Court invoked the *Seminole Rock* doctrine eight times.[235] In these cases, the Court cited neither *Thomas Jefferson University* nor *Gardebring*, and declined to scrutinize the intent of the agency at the time the regulation was issued.[236] But the Court did consider some of the other previously considered factors in determining whether deference was appropriate.

For example, in *Long Island Care at Home, Ltd. v. Coke*,[237] a unanimous Court found that two Department of Labor interpretations fell "well within the principle that an agency's interpretation of its own regulations is controlling unless plainly erroneous or inconsistent with the regulations being interpreted."[238] The Court reasoned that:

> A provision of the Fair Labor Standards Act "exempt[ed] from the statute's minimum wage and maximum hours rules 'any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary [of Labor]).'"[239]

One Department of Labor regulation stated that "companionship" workers who "are employed by an employer or agency other than the family or

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[234] *Id.* (quoting Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994)).

[235] Williamson v. Mazda Motor of Am., Inc., 131 S. Ct. 1131, 1139 (2011); Chase Bank USA, N.A. v. McCoy, 131 S. Ct. 871, 880 (2011); Coeur Ala., Inc. v. Se. Ala. Conservation Council, 557 U.S. 261, 274–75 (2009); Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan, 555 U.S. 285, 295–96 (2009); Fed. Express Corp. v. Holowecki, 552 U.S. 389, 397 (2008); Riegel v. Medtronic, Inc., 552 U.S. 312, 328 (2008); Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 672 (2007); Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 171 (2007). The only opinion wherein the Court cited *Seminole Rock* instead of *Auer* for the *Seminole Rock* deference standard during this period was *Long Island Care*. 551 U.S. at 171.

[236] *See* cases cited *supra* note 235.

[237] 551 U.S. 158 (2007).

[238] *Id.* at 171 (internal quotation marks omitted).

[239] *Id.* at 161–62 (second alteration in original) (quoting 29 U.S.C. § 213(a)(15) (2006)).

household using their services" fall within the statutory exemption.[240] Another regulation, however, was "inconsistent" with this exemption.[241]

In affirming the agency's interpretation, the Court noted that the Department "may have interpreted these regulations differently at different times in their history."[242] It ruled, however, that "as long as interpretive changes create no unfair surprise," such a "change in interpretation alone presents no separate ground for disregarding the Department's present interpretation."[243] The Court did, however, perform a more searching inquiry than it did in *Auer*.

In 2008, the Court also decided *Federal Express Corp. v. Holowecki*,[244] which essentially reaffirmed the *Seminole Rock* standard,[245] but was otherwise notable in two respects. In a 7–2 decision, the Court recognized the "anti-parroting" exception established in *Gonzales*, but declined to cite *Thomas Jefferson University* or look to the agency's intent when it promulgated the regulation at issue.[246]

The case arose under the Age Discrimination in Employment Act of 1967 (ADEA) and required the Court to determine the meaning of the phrase, "a charge alleging unlawful discrimination," which was found in both the ADEA and the Equal Employment Opportunity Commission's (EEOC) implementing regulations.[247]

One of the agency's regulations defined "charge" as "a statement filed with the Commission by or on behalf of an aggrieved person which alleges that the named prospective defendant has engaged in or is about to engage in actions in violation of the Act."[248] And another section explained the "five pieces of information a 'charge should contain.'"[249] The next

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[240] *Id.* at 162 (internal quotation marks omitted) (quoting 29 C.F.R. § 552.109(a) (2006)).

[241] *Id.* at 168. The Court identified the inconsistent regulation as the following:

> [T]he Department's "General Regulation" that defines the statutory term "domestic service employment". . . . says that the term covers services "of a household nature performed by . . . employee[s]" ranging from "maids" to "cooks" to "housekeepers" to "caretakers" and others, "in or about a private home . . . of the person by whom he or she is employed."

Id. (third, fourth, and fifth alterations in original) (emphasis omitted).

[242] *Id.* at 170.

[243] *Id.* at 170–71; *see also id.* (finding that "the Department's recourse to notice-and-comment rulemaking in an attempt to codify its new interpretation makes any such surprise unlikely here" (citation omitted)).

[244] 552 U.S. 389 (2008).

[245] *Id.* at 397.

[246] *Id.* at 397, 397–99 (citing Gonzales v. Oregon, 546 U.S. 243, 257 (2006)).

[247] *See id.* at 393 (citing 29 U.S.C. § 626(d) (2006)) (noting also that the phrase has no statutory definition).

[248] *Id.* at 395–96 (citing 29 C.F.R. § 1626.3 (2007)).

[249] *See id.* at 396 (citing 29 C.F.R. § 1626.8(a)) ("[A] 'charge should contain': (1)-(2) the names, addresses, and telephone numbers of the person making the charge and the charged entity; (3) a statement of facts describing the alleged discriminatory act; (4) the number of employees of the

subsection was more permissive and suggested that a charge was "sufficient" if it was in writing, contained the name of alleged discriminator, and generally alleged the discriminatory act.[250]

To resolve these ambiguities, the Court turned to the EEOC's view of its regulations. The agency opined that the regulations "identif[ed] certain requirements for a charge but [did] not provide an exhaustive definition."[251] Therefore, in its view, even though a document might meet the "minimal requirements" of its regulations, it did not necessarily mean it was a "charge."[252]

Analogizing to *Chevron*, the Court stated that the EEOC was entitled to deference "when it adopts a reasonable interpretation of regulations it has put in force."[253] It then cited *Auer* for the *Seminole Rock* standard: the Court would "accept the agency's position unless it [was] plainly erroneous or inconsistent with the regulation."[254] Adhering to the *Seminole Rock* standard, the Court accepted the agency's position that the regulations were not definitive with respect to the required components of a "charge" and that "[a] permissible reading [was] that the regulations identif[ed] the procedures for filing a charge but [did] not state the full contents a charge document [had to] contain."[255]

Although it recognized that "charge" was a term in the underlying statute and that therefore the *Auer* anti-parroting exception might apply, the Court found it unnecessary to determine whether *Auer* applied because it would have upheld the agency's interpretation under the less deferential standard of review set forth in *Skidmore*.[256]

In 2009, in *Kennedy v. Plan Administrator for DuPont Savings & Investment Plan*,[257] the Court, in another unanimous decision, upheld the agencies' interpretation as set forth in the Government's amicus brief because it was neither "plainly erroneous [n]or inconsistent with the regulation."[258] Although it recognized that the agencies' interpretation had "fluctuated," it nonetheless deferred.[259] The Court found that "the change

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charged employer; and (5) a statement indicating whether the charging party has initiated state proceedings.").

[250] *Id.* (citing 29 C.F.R. § 1626.8(b)); *see also* 29 C.F.R. § 1626.6 ("A charge shall be in writing and shall name the prospective respondent and shall generally allege the discriminatory act(s). Charges received in person or by telephone shall be reduced to writing.").

[251] *Fed. Express Corp.*, 552 U.S. at 397. Although not a party in the case, the Government submitted an amicus brief on behalf of the EEOC. *Id.*

[252] *Id.*

[253] *Fed. Express Corp.*, 552 U.S. at 397.

[254] *Id.* (internal quotation marks omitted) (citing Auer v. Robbins, 519 U.S. 452, 461 (1997)).

[255] *Id.*

[256] *Id.* at 398–99.

[257] 555 U.S. 285 (2009).

[258] *Id.* at 295 (alteration in original) (quoting *Auer*, 519 U.S. at 461).

[259] *Id.* at 296 n.7.

in interpretation alone present[ed] no separate ground for disregarding the [Treasury's and the Labor] Department's present interpretation."[260] Furthermore, according to the Court, "the fact that the interpretation [was] stated in a legal brief [did not] make it unworthy of deference, as '[t]here is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question.'"[261]

The Court's opinions on agency deference from *Gonzales*—which itself may represent something of an anomaly due to its unique set of facts—to mid-2011[262] are more difficult to characterize as a whole than some of the earlier decisional trends on the subject. But, at a minimum, they show that the Court has more or less reverted to its original *Seminole Rock* approach.

G. *Mid-2011 to the Present:* Seminole Rock *Reconsidered?*

In June 2011, the Court released its opinion in *Talk America, Inc. v. Michigan Bell Telephone Co.*,[263] in which Justice Scalia notably highlighted the *Seminole Rock* doctrine in a short concurrence.[264] At issue in *Talk America* was whether local telephone service providers "must make certain transmission facilities available to competitors at cost-based rates."[265] The Court observed that "[n]o statute or regulation squarely addresse[d]" whether the providers were required to do so under the applicable statute and regulations.[266] Consequently, it stated that "[i]n the absence of any unambiguous statute or regulation," the Court would "turn to the FCC's interpretation of its regulations."[267] And the FCC had interpreted its regulations to require the facilities to be made available if they were to be used "to link the incumbent provider's telephone network

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[260] *Id.* (second alteration in original) (quoting Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 171 (2007)).

[261] *Id.* (third alteration in original) (quoting *Auer*, 519 U.S. at 462).

[262] *See* Williamson v. Mazda Motor of Am., Inc., 131 S. Ct. 1131, 1139 (2011) (deferring under *Auer* because there was "no reason to suspect that [the agency's] views reflect[] anything other than the agency's fair and considered judgment on the matter" (internal quotation marks omitted)); Chase Bank USA, N.A. v. McCoy, 131 S. Ct. 871, 881 (2011) ("Under the principles set forth in *Auer*, we give deference to this interpretation."); Coeur Ala., Inc. v. Se. Ala. Conservation Council, 557 U.S. 261, 284 (2009) (deferring under *Auer* because the interpretation "presents a reasonable interpretation of the regulatory regime" and therefore is not plainly erroneous or inconsistent with the regulations); Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 672 (2007) (citing the *Auer* standard and finding "that deferential standard is plainly met here").

[263] 131 S. Ct. 2254 (2011).

[264] *See id.* at 2265–66 (Scalia, J., concurring) (discussing how he would reach the same holding as the majority without relying on the *Seminole Rock* doctrine, since "the FCC's interpretation is the fairest reading of the orders in question").

[265] *Id.* at 2257 (majority opinion).

[266] *Id.* at 2260.

[267] *Id.* at 2260–61.

with the competitor's network for the mutual exchange of traffic."[268]

Although the FCC was not a party to the litigation and had merely appeared as amicus curiae and submitted its view in a brief, the Court nonetheless deferred to the agency. Citing *Auer* and another recent decision, the Court found that deference for the agency's interpretation was still appropriate "even in a legal brief, unless the interpretation [was] 'plainly erroneous or inconsistent with the regulation[s]' or there [was] any other 'reason to suspect that the interpretation [did] not reflect the agency's fair and considered judgment on the matter in question.'"[269]

In analyzing the interpretation, the Court first noted that the FCC's interpretation, far from being "plainly erroneous or inconsistent with the regulation[s]," was "more than reasonable."[270] It also noted that "there [was] no danger that deferring to the Commission would effectively 'permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation,'" and that the interpretation did not constitute "a *post-hoc* rationalization."[271] Concluding its opinion by reversing the court of appeals, the Court framed the decision as having relied exclusively on the *Seminole Rock* doctrine: "The FCC as amicus curiae has advanced a reasonable interpretation of its regulations, and we defer to its views."[272]

Although Justice Scalia joined the opinion of the Court, he wrote a concurring opinion specifically to highlight his newfound discomfort with the *Seminole Rock* doctrine: "For while I have in the past uncritically accepted that rule, I have become increasingly doubtful of its validity."[273] He summarized many of the criticisms set forth previously, including that it encourages agencies to enact vague regulations, may violate the separation of powers doctrine, and "frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government."[274] Significantly, he concluded his short concurrence by stating: "We have not been asked to reconsider *Auer* in the present case. When we are, I will be receptive to doing so."[275]

Following Justice Scalia's "shot across the bow" in *Talk America*, the Court had an opportunity to address the *Seminole Rock* standard in 2012 in *Christopher v. SmithKline Beecham Corp*.[276] Although it illustrates the

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[268] *Id.* at 2257.

[269] *Id.* at 2261 (second alteration in original) (quoting Chase Bank USA, N.A. v. McCoy, 131 S. Ct. 871, 881 (2011)).

[270] *Id.* at 2262 (alteration in original).

[271] *Id.* at 2263 (quoting Christensen v. Harris Cnty., 529 U.S. 576, 588 (2000)).

[272] *Id.* at 2265.

[273] *Id.* at 2266 (Scalia, J., concurring). Scalia referred to the *Seminole Rock* doctrine as "*Auer* deference." *Id.*

[274] *Id.*

[275] *Id.*

[276] 132 S. Ct. 2156 (2012).

rare case where the Court declined to grant an agency *Seminole Rock* deference, the Court failed to provide a framework and precise test for deciding the *Seminole Rock* question.[277] Instead, the Court reasoned that select past cases (some of which are not even part of the *Seminole Rock*/*Auer* line of cases) provided support for withholding agency deference.[278]

In *SmithKline Beecham*, the Court faced the relatively straightforward question of "whether the term 'outside salesman,' as defined by Department of Labor (DOL or Department) regulations, encompasse[d] pharmaceutical sales representatives whose primary duty is to obtain nonbinding commitments from physicians to prescribe their employer's prescription drugs in appropriate cases."[279] After discussing the regulations at issue and the DOL's interpretation, the Court turned to whether it should defer to that interpretation.[280]

The Court began by noting that "*Auer* ordinarily calls for deference to an agency's interpretation of its own ambiguous regulation, even when that interpretation is advanced in a legal brief."[281] But it then recognized that "this general rule does not apply in all cases."[282] The Court first quoted the *Seminole Rock*/*Auer* standard that the rule does not apply when the interpretation is "plainly erroneous or inconsistent with the regulation."[283] It then cited to additional language in *Auer* that deference might not be appropriate "when there is reason to suspect that the agency's interpretation 'does not reflect the agency's fair and considered judgment on the matter in question.'"[284]

In an attempt to discern when an agency's interpretation does not reflect its fair and considered judgment, the Court listed several examples.[285] First, it "might occur when the agency's interpretation conflicts with a prior interpretation."[286] This concern had been set forth in other cases, such as *Thomas Jefferson University v. Shalala*, and demonstrates the Court's attempt to incorporate previous holdings into its inquiry.[287] Second, the Court noted that when an agency's interpretation appears to be "nothing more than a 'convenient litigating position,'" or a

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[277] *Id.* at 2166–67.

[278] *Id.* at 2167 (referencing *Martin v. Occupational Safety & Health Review Commission*, 499 U.S. 144, 170–71 (1991) and *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 295 (1974) to support the Court's claim that *Auer* deference was unnecessary).

[279] *Id.* at 2161.

[280] *Id.* at 2166.

[281] *Id.*

[282] *Id.*

[283] *Id.*

[284] *Id.* (quoting Auer v. Robbins, 519 U.S. 452, 462 (1997)).

[285] *Id.*

[286] *Id.* (citing Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 515 (1994)).

[287] *Id.*

'"*post hoc* rationalizatio[n]' advanced by an agency seeking to defend past agency action against attack," then *Seminole Rock* deference is not due.[288] These, too, represent the Court's acceptance of past limits on *Seminole Rock*.

Based on these factors, the Court had no hesitation in declining to give the DOL's interpretation deference under *Seminole Rock*.[289] The Court found that acceptance of the DOL's interpretation would not give fair warning to the public and would constitute "unfair surprise."[290] Although acknowledging the advantages of such a highly deferential standard, it instead applied the less deferential *Skidmore* standard.[291] Then, even when taking into account this less deferential standard, the Court was unable to defer to the DOL's interpretation and "employ[ed] traditional tools of interpretation" to conclude that the sales representatives at issue were "outside salesmen" under the regulations.[292]

Both *Talk America* and *SmithKline Beecham* are significant for what they did and did not do. Although the *Talk America* majority, which included Justice Scalia, endorsed the *Seminole Rock* doctrine, Justice Scalia's concurrence notably raised the issue of whether the doctrine should be revisited and possibly overruled by the Court.[293] *SmithKline Beecham* is significant because the Court identified specific "exceptions" which demonstrated its acceptance that the doctrine is not unbridled.[294] And in doing so, it marked a retreat from *Auer*'s nearly automatic grant of deference to the agency. But the Court failed to resolve the doctrinal concerns raised by *Seminole Rock*, as a general matter.

Following in the wake of *Talk America* and *SmithKline Beecham*, the *Seminole Rock* doctrine prominently appeared in the Court's opinions in *Decker v. Northwest Environmental Defense Center*.[295] The various opinions—and especially the concurring opinion of Chief Justice Roberts—unquestionably demonstrate that the Court is prepared to re-evaluate the doctrine in a suitable case.

In *Decker*, the Court was called upon to decide whether the federal "Clean Water Act (CWA) and its implementing regulations require permits before channeled stormwater runoff from logging roads can be discharged into the navigable waters of the United States."[296] Under the CWA and the

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[288] *Id.* at 2166–67 (alteration in original) (quoting Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 213 (1988) and *Auer*, 519 U.S. at 462).

[289] *Id.* at 2168.

[290] *Id.* at 2167 (quoting Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 170 (2007)).

[291] *Id.* at 2168–69.

[292] *Id.* at 2170, 2172.

[293] Talk Am., Inc. v. Mich. Bell Tel. Co., 131 S. Ct. 2254, 2265–66 (2011) (Scalia, J., concurring).

[294] *SmithKline Beecham*, 132 S. Ct. at 2166.

[295] 133 S. Ct. 1326 (2013).

[296] *Id.* at 1330.

implementing regulations issued by the EPA, a permit for such runoff is required if the discharge is "deemed to be 'associated with industrial activity.'"[297] In turn, an EPA regulation defines "the term 'associated with industrial activity' to cover only discharges 'from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant.'"[298] In an amicus brief filed in the case, "[t]he EPA interprets its regulation to exclude the type of stormwater discharges from logging roads at issue."[299] Citing *Auer*, the Court concluded that, because the EPA's determination was a "reasonable interpretation of its own regulation," *Seminole Rock* deference would be accorded to that interpretation.[300]

With respect to an agency's interpretation of a regulation, Justice Kennedy, writing for the majority, made clear that the Court "as a general rule, defers to it unless that interpretation is 'plainly erroneous or inconsistent with the regulation.'"[301] The Court then held that the "EPA's interpretation [was] a permissible one."[302] As a separate rationale to defer to the EPA's interpretation under *Seminole Rock*, the Court noted that "there is no indication that [the EPA's] current view [was] a change from prior practice or a post hoc justification adopted in response to litigation."[303]

In a separate opinion, Justice Scalia voiced his dissatisfaction with the *Seminole Rock* doctrine. He decried that "[e]nough is enough" with respect to "giving agencies the authority to say what their rules mean, under the harmless-sounding banner of" *Seminole Rock* deference.[304] Unlike in *Talk America*, where the "agency's interpretation of the rule was also the fairest one, and no party had asked [the Court] to reconsider" the doctrine, Justice Scalia maintained that the application of the *Seminole Rock* doctrine in *Decker* "[made] the difference."[305] Furthermore, he asserted that the "circumstances of these cases illustrate *Auer*'s flaws in a particularly vivid way."[306]

Noting that the Court had never set forth a "persuasive justification" for *Seminole Rock* deference, Justice Scalia identified many of the

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[297] *Id.* (quoting 33 U.S.C. § 1342(p)(2)(B) (2006))

[298] *Id.* at 1330–31 (quoting 40 C.F.R. § 122.26(b)(14) (2006)).

[299] *Id.* at 1331 (citing Brief for United States as Amicus Curiae Supporting Petitioners at 24–27, *Decker*, 133 S. Ct. 1326 (Nos. 11-338, 11-347)).

[300] *Id.* (citing Auer v. Robbins, 519 U.S. 452, 461 (1997)).

[301] *Id.* at 1337 (citing Chase Bank USA, N.A. v. McCoy, 562 U.S. 871, 881 (2011) (quoting *Auer*, 519 U.S. at 461)).

[302] *Id.*

[303] *Id.* (citing Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2166–67 (2012)).

[304] *Id.* at 1339 (Scalia, J., concurring in part and dissenting in part) (citing Talk Am., Inc. v. Mich. Bell Tel. Co., 131 S. Ct. 2254, 2265 (2011) (Scalia, J., concurring).

[305] *Id.*

[306] *Id.*

criticisms of the doctrine set forth by scholars in academic literature and by Justices in past decisions.[307] He concluded his criticism of the *Seminole Rock* doctrine by opining that "however great may be the efficiency gains derived from *Auer* deference, beneficial effect cannot justify a rule that not only has no principled basis but contravenes one of the great rules of separation of powers," namely, the power of self-interpretation.[308] Accordingly, he would have resolved the meaning of the regulation in question by applying "familiar tools of textual interpretation" such as the fairest reading of the regulations.[309]

But the most significant aspect of this case (with respect to the future development of the *Seminole Rock* doctrine) was the concurring opinion of Chief Justice Roberts, joined by Justice Alito, which was devoted entirely to highlight the Court's interest in the doctrine.[310] The Chief Justice called special attention to Justice Scalia's opinion, which "raise[d] serious questions about the principle set forth" in *Seminole Rock* and *Auer*.[311] He acknowledged that although "[i]t may be appropriate to reconsider that principle in an appropriate case," the present case was not appropriate due to the lack of fully-developed arguments by the parties on the doctrine.[312]

But recognizing that the doctrine goes "to the heart of administrative law" that "arise as a matter of course on a regular basis," he then specifically made the bar "aware that there is some interest in reconsidering those cases."[313] The Chief Justice concluded his opinion by stating that he "would await a case in which the issue is properly raised and argued."[314]

Decker, in combination with *Talk America* and *SmithKline Beecham*, provides the strongest evidence that the Court will agree to hear a case involving *Seminole Rock* in order to re-evaluate the doctrine. Consequently, it is possible that the Court could soon resolve many of the questions emanating from its opinions over the past sixty-eight years. It remains to be seen, however, whether the Court, in re-evaluating the doctrine, will reject the doctrine, will take the opportunity to create a consistent framework or test (as exists for statutory interpretation under *Chevron*) for courts to apply when deciding whether to defer under

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[307] *Id.* at 1341 (quoting Thomas Jefferson University v. Shalala, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting) and Anthony, *supra* note 21, at 11–12, and generally citing Manning, *supra* note 4).

[308] *Id.* at 1342.

[309] *Id.*

[310] *Id.* at 1338 (Roberts, C.J., concurring).

[311] *Id.* (citing Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945) and Auer v. Robbins, 519 U.S. 452 (1997)).

[312] *Id.* at 1338–39.

[313] *Id.* at 1339.

[314] *Id.*

Seminole Rock, or will simply add to the confusion by endorsing the doctrine without adding meaningful limits or parameters for the lower courts to apply.[315]

V. A NEW APPROACH

A. *Introduction*

This Part proposes a new approach to the *Seminole Rock* doctrine that is based upon an analysis of the doctrine as it has been applied from 1945 to the present day. At the outset, it is worth highlighting that the Court in *Seminole Rock* did not explain its justification for giving an agency controlling deference for its interpretation of its regulation. Not only does this raise questions as to whether the Court knew at the time that its brief statement concerning deference would provide the basis for a seminal administrative law doctrine, but the absence of an underlying rationale for the doctrine might also help explain the doctrine's "slow start" with respect to its appearance in Supreme Court jurisprudence during the first two decades following the decision.

Yet when the Court began to apply the standard more routinely (primarily in the 1970s through the mid-1980s), the Court's analysis was often more searching than the text of the standard would have suggested was necessary.[316] And despite the lack of explicit explanation or guidance in *Seminole Rock* as to how one might determine whether an interpretation was "plainly erroneous or inconsistent with the regulation," the Court consistently looked to certain factors when deciding whether to defer.[317] Principal among these factors was an inquiry into whether the agency's interpretation had been consistent over time.[318] And in the short-lived rule announced in *Gardebring v. Jenkins*, the Court explained that the *Seminole Rock* standard also required courts to analyze the agency's intent when it originally promulgated the regulation in question.[319] Likely motivating this more searching inquiry into the deference question was the concern—voiced by several members of the Court during the 1990s—that the *Seminole Rock* standard provided an agency with the incentive to issue

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[316] *See supra* Part IV.B.

[316] *See supra* Part IV.B.

[317] *See, e.g.*, Gonzales v. Oregon, 546 U.S. 243, 257 (2006) (creating the anti-parroting exception); Auer v. Robbins, 519 U.S. 452, 462 (1997) (explaining that the agency had not engaged in post hoc rationalization, which might have undermined its entitlement to deference); Gardebring v. Jenkins, 485 U.S. 415, 430 (1988) (considering the agency's intent at the time it promulgated the regulation in question); Udall v. Tallman, 380 U.S. 1, 16–17 (1965) (emphasizing that the agency had consistently interpreted the order in question in opting to defer to it).

[318] N. Ind. Pub. Serv. Co. v. Porter Cnty. Chapter of the Izaak Walton League of Am., Inc., 423 U.S. 12, 15 (1975); Ehlert v. United States, 402 U.S. 99, 105 (1971); *Udall*, 380 U.S. at 16–17.

[319] *Gardebring*, 485 U.S. at 430.

vague regulations and "reinterpret" them whenever the need presented itself.[320]

But after the Court's 1997 unanimous opinion in *Auer*, the Court seemed to shy away from a meaningful inquiry into whether to defer—and particularly from any inquiry into the agency's intent at the time it promulgated the regulation, as set forth in *Thomas Jefferson University* and *Gardebring*.[321] Indeed, the *Auer* decision once again suggested that not much more is required than a brief look at the agency's interpretation before accepting it.

Although the Court seemed to revive the "intent" factor in *Gonzales* in 2006,[322] this too was short-lived. In post-*Gonzales* cases, such as *Long Island Care*,[323] *National Association of Home Builders*,[324] *Holowecki*,[325] and *Kennedy*,[326] the Court did not mention the agency's intent when it promulgated the regulation as a relevant factor in determining whether to defer. While it looked at the other various factors, the current trend, overall, suggests that the Court has reverted back to its original *Seminole Rock* approach.

But Justice Scalia's concurring opinion in *Talk America* opened the door to revisiting not only the contours of the doctrine, but the doctrine itself.[327] And because the Court did not need to reconsider the doctrine as a whole in order to deny *Seminole Rock* deference to the agency at issue in *SmithKline Beecham*,[328] the Court has yet to squarely address the long-standing practical and doctrinal concerns that were resurrected by Justice Scalia in his *Talk America* and *Decker* opinions.

Reflecting on the Court's most recent pronouncements, I believe that it missed an important opportunity to establish a test and define the precise contours of the *Seminole Rock* doctrine in *SmithKline Beecham* and *Decker*. In neglecting to do so, the Court has perpetuated the doctrinal inconsistency—and even confusion—set forth in its opinions over the past

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[320] *See* Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 110–11 (1995) (O'Connor, J., dissenting) ("An agency is bound by the regulations it promulgates and may not attempt to circumvent the amendment process through substantive changes recorded in an informal policy manual that are unsupported by the language of the regulation."); Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting) ("It is perfectly understandable, of course, for an agency to issue vague regulations, because to do so maximizes agency power and allows the agency greater latitude to make law through adjudication rather than through the more cumbersome rulemaking process.").

[321] *Thomas Jefferson Univ.*, 512 U.S. at 512; *Gardebring*, 485 U.S. at 512.

[322] *Gonzales*, 546 U.S. at 258.

[323] Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 171 (2007).

[324] Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 672–73 (2007).

[325] Fed. Express Corp. v. Holowecki, 552 U.S. 389, 397 (2008).

[326] Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan, 555 U.S. 285, 295–97 (2009).

[327] Talk Am., Inc. v. Mich. Bell Tel. Co., 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring) ("We have not been asked to reconsider *Auer* in the present case. When we are, I will be receptive to doing so.").

[328] Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2168 (2012).

sixty-five years. Taken altogether, however, these sometimes-divergent opinions are important because many of the factors considered by the Court in those cases promote fairness, consistency, and accountability in the administrative state. And if adopted as part of an established test for *Seminole Rock* deference, they would go a long way to allay concerns of unconstitutional agency "self-interpretation" and lack of an independent judicial check on the agency interpretation. It is these factors that therefore provide the foundation for the new standard I propose below.

B. *A New Approach to the* Seminole Rock *Doctrine*

Some scholars have argued, expressly or impliedly, that the Supreme Court should overrule *Seminole Rock*.[329] They claim that an agency's interpretation of its own regulations should be reviewed under the less deferential standard set forth in *Skidmore v. Swift & Co*.[330] Professors Robert Anthony and John Manning, for example, have extensively explored various practical and constitutional concerns with the *Seminole Rock* doctrine as currently applied by the Court.[331]

Other scholars have reached the opposite conclusion. Professor Richard Pierce, Jr. and Scott Angstreich, for example, have defended the *Seminole Rock* standard.[332] They believe that the Court should reaffirm and retain the *Seminole Rock* doctrine, thereby protecting the highly deferential standard set forth in *Chevron*.

I find neither approach entirely satisfying. In fact, I find myself between a rock and a hard place when asked to choose between them. So rather than surveying their arguments and ultimately choosing a side, my goal here is to offer a practical solution that aims to address legitimate criticism on both sides of the issue. Guided by the Court's prior opinions and deference analyses over sixty years, I propose a new approach. This approach does not wholly reject or accept *Seminole Rock* deference and instead represents an intermediate level of deference that essentially combines features of the current controlling deference standards, including *Seminole Rock* and *Chevron*, with the less deferential standard of *Skidmore*.

The standard continues to value the expertise and experience that an agency brings to the table when determining the meaning of a regulation.

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[329] Manning, *supra* note 4, at 618; *see also* Anthony, *supra* note 21, at 9–10 (indicating that the Supreme Court should not let agencies judge their own regulations). Justices on the Supreme Court have likewise expressed concern with the doctrine. *E.g.*, *Talk Am.*, 131 S. Ct. at 2265–66 (Scalia, J., concurring); Shalala v. Guernesey Mem'l Hosp., 514 U.S. 87, 108, 110–11 (1995) (O'Connor, J., dissenting); Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994).

[330] Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

[331] Anthony, *supra* note 21, at 4–8; Manning, *supra* note 4, at 618.

[332] Angstreich, *supra* note 4, at 112; Pierce, *supra* note 11, at 569–72.

And while it allows the agency's proffered interpretation to remain the focal point, it also ensures that the judiciary will play a more prominent and independent role when reviewing the underlying regulation than under the current *Seminole Rock* standard. It accomplishes this important goal by incorporating objective criteria into the analysis to determine whether to defer.

But the test does not go so far as to include a key feature of the *Skidmore* standard: its reliance on the "persuasiveness" as the "ultimate touchstone for deference."[333] By eschewing such a factor, a court's ability to substitute its own policy judgment for that of the agency will be more limited. While this may not entirely satisfy some critics, such as Professor Manning, who believe that a court must have "an independent judicial check," it nonetheless should satisfy their view that "it is crucial to have some meaningful external check upon the power of the agency to determine the meaning of the laws that it writes."[334]

And while I recognize that these scholars may believe that it would be prudent to replace the *Seminole Rock* standard with *Skidmore*'s test, I find it to be unrealistic for both pragmatic and doctrinal reasons. As a pragmatic matter, the Court has reaffirmed the *Seminole Rock* doctrine as recently as the 2012 Term and it seems extremely unlikely to sweep away so many years of adherence to the doctrine now. As a doctrinal matter, the modification that I propose will remain faithful to *Seminole Rock*'s core holding,[335] thereby avoiding the need to overrule the case directly.

I also acknowledge the many advantages to retaining and reaffirming *Seminole Rock* in its current form. For example, it would enable agencies to streamline policy changes (especially when leadership in the Executive Branch changes) and to "shore up" *Chevron*.[336] I ultimately believe that, on balance, a change of the current standard would better effectuate consistency, transparency, and accountability in the administrative state, including the potential to "enhance the efficacy of notice-and-comment rulemaking, improve regulated parties' ability to conform their conduct to the law's requirements, and provide the legal community a firmer benchmark against which to measure and control arbitrary conduct by

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[333] Merrill & Hickman, *supra* note 53, at 862 (internal quotation marks omitted).

[334] Manning, *supra* note 4, at 618, 682.

[335] Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945).

[336] Angstreich, *supra* note 4, at 58; *see also* Pierce, *supra* note 11, at 604 (arguing that overruling *Seminole Rock* would "exacerbat[e] the problem of delay between the time a President is elected and the time when the courts will allow his policy preferences to replace those of his predecessor"). Professor Pierce, however, suggests several modest improvements to the doctrine, including two suggestions that are addressed in the test proposed here: (1) whether the agency's interpretation is merely a "litigating position"; and (2) whether the "antiparroting exception" to *Seminole Rock* deference applies. *Id.* at 605–06.

officials in the field."[337]

The formulation of the *Seminole Rock* standard that I advance essentially incorporates the following three key elements: (1) the core holding of the decision itself—namely, that deference to an administrative agency's interpretation of its own regulation is warranted unless the interpretation "is plainly erroneous or inconsistent with the regulation"; (2) features relied upon by the Court in other deference regimes, such as *Chevron*; and (3) factors from the Court's previous decisions applying *Seminole Rock* doctrine.

The new deference approach for courts is divided into a two-step test.[338] As in *Chevron*, when faced with an agency's interpretation of its regulation, the first step would be to determine whether the regulation is ambiguous. If ambiguous, the second step would be to apply four objective factors to the deference questions.[339] These factors are: (1) the administrative agency's stated intent at the time of the regulation's promulgation; (2) whether the interpretation currently advanced has been consistently held; (3) in what format the interpretation appears; and (4) whether the regulation merely restates or "parrots" the statutory language. The analysis of these factors would determine whether or not the agency would be entitled to controlling deference under *Seminole Rock*.

1. *Step One of the New* Seminole Rock *Test*

As in *Chevron*, a court would determine whether to grant *Seminole Rock* deference using a two-step test.[340] In *Chevron*'s familiar two-step test, a court first looks to whether Congress has directly spoken on the question at issue.[341] If Congress has, the court's inquiry is at an end.[342] However, if the statute is silent or ambiguous, the court determines whether the agency's interpretation is "based on a permissible construction of the statute."[343] If permissible, the interpretation is controlling.[344]

When assessing an agency's interpretation of a regulation, a similar first step would ask whether the regulation at issue is ambiguous. If there is no ambiguity, the reviewing court need not consider the agency's

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[337] Manning, *supra* note 4, at 685; *see id.* (explaining why it would be advantageous to adopt "structural incentives for agencies to draft clearer regulations").

[338] Just as *Chevron* applies only when an agency is interpreting a statute that it has been granted the authority to administer, so too does this test apply only when an agency is interpreting a regulation it administers. If the agency were interpreting a regulation that it does not administer, a court generally would apply the *Skidmore* test.

[339] As discussed *infra* Part V.B.2.a, these factors give meaning to the aspect of the *Seminole Rock* standard that precludes deference if the interpretation is "inconsistent with the regulation."

[340] Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

[341] *Id.* at 842.

[342] *Id.* at 842–43.

[343] *Id.* at 843.

[344] *Id.* at 843–44.

interpretation and would enforce the plain language of the regulation.[345] If the court finds that the regulation is ambiguous, it should then proceed to the multifactor inquiry set forth below to decide whether the agency's interpretation satisfies the other prong of the *Seminole Rock* formulation, specifically, whether it is "inconsistent with the regulation."[346]

As an initial matter, the use of a two-step test should come as no surprise to those who have looked closely at the doctrine.[347] And it should not raise any serious objections. An agency simply cannot prevail (under any deference regime) if it proffers an interpretation that directly conflicts with the plain language of the regulation. As stated by the Court in *Christensen*, deference in that situation would "permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation."[348]

The adoption of such a step also has direct support from the *Seminole Rock* decision itself. The Court prefaced its statement that the agency's interpretation must be accepted unless "plainly erroneous or inconsistent with the regulation" by noting that the agency's interpretation of the regulation was only relevant "if the meaning of the works used [in the regulation was] in doubt."[349] In addition, it may well be that any agency interpretation that conflicts with plain language of the regulation, by definition, "is plainly erroneous."[350]

2. *Step Two of the New* Seminole Rock *Test*

Step two of the new *Seminole Rock* test would look to four objective factors to determine whether to grant controlling deference to an agency's interpretation of its regulation. Unlike *Skidmore*, where courts subjectively weigh the "persuasiveness" of the agency's explanation, courts applying this test would mechanically analyze: (1) the stated intent and/or interpretation of the agency (if it exists) when the agency promulgated the

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[345] *See* Bowles v. Seminole Rock, 325 U.S. 410, 414 (1945) (asserting that there was no ambiguity in the law and, therefore, the analysis should focus on the "plain words of the regulation").

[346] *Id.*

[347] *See* Angstreich, *supra* note 4, at 70–71 (noting that *Seminole Rock* doctrine would be better expressed as a two-step process).

[348] Christensen v. Harris Cnty., 529 U.S. 576, 588 (2000); *see also* Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 110 (1995) (O'Connor, J., dissenting) ("An agency is bound by the regulations it promulgates . . . .").

[349] *Seminole Rock*, 325 U.S. at 414.

[350] As discussed in Part III, although the Supreme Court rarely explicitly mentioned this inquiry when determining whether to grant *Seminole Rock* deference, it was abundantly clear from the context of those opinions that the regulation at issue was ambiguous. In any event, in *Gardebring v. Jenkins*, the Court clearly articulated the *Seminole Rock* standard as requiring deference unless an alternate interpretation is "compelled by the regulation's plain language." 485 U.S. 415, 430 (1988). Likewise, in *Christensen v. Harris County*—nearly fifty-five years after the *Seminole Rock* decision—the Court explicitly reaffirmed that "deference is warranted only when the language of the regulation is ambiguous." 529 U.S. at 588.

regulation at issue; (2) whether the agency's interpretation has been consistent over time; (3) the format in which the agency offers its interpretation; and (4) whether the regulation in question merely repeated the statutory language.

a. Stated Intent of the Agency at the Time It Promulgated the Regulation

When determining whether an agency's interpretation of an ambiguous regulation should be granted controlling deference, courts would begin by looking to whether the agency expressed a contrary intent when it originally promulgated the regulation in question. For example, courts should understandably be wary of deferring to the new interpretation if the agency had explained in a preamble to a final rule how a particular regulation would function, set forth a contrary interpretation upon promulgation, or issued a statement contemporaneously with the regulation.

Not only does the consideration of an agency's intent when it promulgated the regulation at issue "most closely approximate[] the Supreme Court's announced guidance," it provides a necessary check on an agency's discretion.[351] If the intent of the agency is defined at the time a regulation is issued, the public is entitled to rely upon that interpretation when deciding how to act or conduct its business. Indeed, the method for an agency to create legal obligations by enacting regulations is to engage in notice and comment rulemaking under the APA. As its name suggests, this administrative process gives notice to the public and generally provides for an opportunity to submit comments on the rule before it is finalized.[352] Because "[t]raditional concepts of due process [are] incorporated into administrative law," proper APA rulemaking therefore enforces both equitable principles of fair notice and constitutional due process concerns.[353] Incorporating an analysis of the agency's stated intent in deciding whether to defer to its proffered interpretation therefore reinforces this safeguard.

Limiting an agency from deviating from its stated intent when it promulgated the regulation at issue likewise would also help bring the *Seminole Rock* doctrine in line with the related and prevailing view that post-enactment statements by Congress on prior legislation are suspect. As

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[351] Noah, *supra* note 6, at 291–92.

[352] *See* Thomas L. Casey, III, *Towards Function and Fair Notice: Two Models for Effecting Executive Policy Through Changing Agency Interpretations of Ambiguous Statutes and Rules*, 2008 MICH. ST. L. REV. 725, 738–40 (providing an overview of APA rulemaking process requirements).

[353] *Id.* at 757 (quoting Satellite Broad Co. v. FCC, 824 F.2d 1, 3 (D.C. Cir. 1987)) (internal quotation marks omitted). As Mr. Casey points out, some courts have "incorporated broader equitable considerations into its fair notice analysis" beyond "purely . . . constitutional due process requirements." *Id.* at 758.

Professor Lars Noah succinctly and astutely point outs: "Ironically, when interpreting regulations, courts appear to give the most credence to post-promulgation expressions of agency intent, precisely the converse of the view that post-enactment expressions of legislative intent deserve little if any weight."[354]

Looking to the agency's stated intent also draws support from several of the Court's more recent opinions applying the doctrine. For example, in *Gardebring v. Jenkins*, seven Justices (including two in dissent) endorsed the proposition that the applicable legal test and view holds that the Court is "properly hesitant to substitute an alternative reading for the [agency's] unless that alternative reading is compelled by the regulation's plain language *or by other indications of the [agency's] intent at the time of the regulation's promulgation*."[355] And in *Thomas Jefferson University v. Shalala*, the Court likewise explained that the *Seminole Rock* standard required an analysis as to whether an alternative interpretation was compelled by indications of the agency's "intent at the time of the regulation's promulgation."[356] Finally, in 2006, the Court in *Gonzales v. Oregon* relied on its finding that because the current interpretation ran counter to the "intent at the time of the regulation's promulgation," *Seminole Rock* deference was unwarranted.[357]

Moreover, as set forth in more detail immediately below, the consistency of an agency's position is the next factor in the test proposed here. Determining the stated intent of the agency at the time of the regulation's promulgation therefore provides a needed baseline for determining whether the agency's position has, in fact, been consistent over time.

b. Whether an Agency's Interpretation of Its Regulation Is Consistent with Prior Interpretations

Next, courts should consider whether the proffered agency interpretation is consistent with prior interpretations by the agency. This factor provides an important check against newly minted agency interpretations that are not a result of reasoned decision making. Looking to the agency's consistency would effectively provide a disincentive for agencies to hastily change an interpretation, most likely through an

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[354] Noah, *supra* note 6, at 284.

[355] 485 U.S. 415, 430, 432 (1988) (emphasis added).

[356] 512 U.S. 504, 512 (1994) (quoting *Gardebring*, 485 U.S. at 430) (internal quotation marks omitted). In addition, Justice Marshall's dissent in *Mullins Coal* would have rejected the agency's interpretation in that case, in part, because it conflicted with "comments of the Secretary accompanying the final promulgation of the regulations . . . ." Mullins Coal Co. v. Dir., Office of Workers' Comp. Programs, 484 U.S. 135, 166 (1987) (Marshall, J., dissenting).

[357] Gonzales v. Oregon, 546 U.S. 243, 258 (2006) (quoting *Thomas Jefferson Univ.*, 512 U.S. at 512 (internal quotation marks omitted)).

informal manner.

As a theoretical matter, as Professors Michael Asimow and Robert A. Anthony point out, changed interpretations do not warrant deference because most, if not all, of the justifications for giving an agency deference are simply not present when a new or changed interpretation is: (1) not consistent with earlier ones; (2) unlikely to be a long-standing interpretation; (3) not adopted contemporaneously with the regulation; (4) not adopted with public participation; and/or (5) more likely to disturb reliance interests.[358] Thus, they argue, a court should be "free to address the interpretive issue with judicial neutrality" and it is "in a clear position to determine its own interpretation of the agency regulation."[359]

For this reason, "[o]f all the *Skidmore* factors, consistency seems most widely used."[360] Insisting upon consistency as an express factor thereby "directs courts to give weight to interpretations that have not changed over time, affording longstanding administrative interpretations respect, in part, simply because they are long-standing."[361]

Consideration of consistency also reinforces related principles articulated by the Court that ensure sound agency decision making and governmental transparency. For example, in *Thomas Jefferson University v. Shalala*, the Court acknowledged that "it is true that an agency's interpretation of a statute or regulation that conflicts with a prior interpretation is 'entitled to considerably less deference' than a consistently held agency view."[362] The Court has also suggested that when an agency

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[358] Michael Asimow & Robert A. Anthony, *A Second Opinion? Inconsistent Interpretive Rules*, 25 ADMIN. & REG. L. NEWS, Winter 2000, at 16, 16.

[359] *Id.* Professors Asimow and Anthony note, however, that:

> An agency interpretation should of course be accorded the consideration that the agency's specialized work may warrant. Very often—probably in the great majority of cases—the court's independently arrived-at interpretation will concur with that of the agency. But that outcome should be the result of the court's own free decision, not of some mechanistic deference to an informal agency position not promulgated by notice and comment or otherwise pursuant to delegated lawmaking authority.

Id. at 16–17.

[360] Jim Rossi, *Respecting Deference: Conceptualizing* Skidmore *Within the Architecture of* Chevron, 42 WM. & MARY L. REV. 1105, 1144 (2001); *see also* Ellen P. Aprill, *Theories of Statutory Interpretation: The Interpretive Voice*, 38 LOY. L.A. L. REV. 2081, 2113 (2005) (discussing *Skidmore*'s reliance on consistency).

[361] Aprill, *supra* note 360, at 2113; *see* N. Haven Bd. of Educ. v. Bell, 456 U.S. 512, 522 n.12 (1982) (stating that an agency's own longstanding interpretation ought to be given "particular deference").

[362] 512 U.S. 504, 515 (1994) (quoting Watt v. Alaska, 451 U.S. 259, 273 (1981)). Other cases involving *Seminole Rock* deference reinforce the view that the consistency of the agency's interpretation has been an important factor. For example, in one of the first cases applying the *Seminole Rock* doctrine, *Udall v. Tallman*, the Court noted that the agency had consistently construed the orders at issue. 380 U.S. 1, 16–17 (1965). Likewise, six years later in *Ehlert v. United States*, the Court cited *Seminole Rock* when it stated that it was "obligated to regard as controlling a reasonable,

changes its view, it has an affirmative duty "to explain its departure from prior norms."[363]

In the 2012 *SmithKline Beecham* decision, the Court stated that *Seminole Rock* deference might not be appropriate "when the agency's interpretation conflicts with a prior interpretation."[364] Indeed, the Court has explicitly held that "the consistency of an agency's position is a factor in assessing the weight that position is due."[365]

Of course, there can be good reasons for an agency to change its interpretation and for allowing them broad leeway to do so. The agency should be prepared, however, to justify that decision, particularly if it elects to forego a notice and comment procedure. At bottom, consistency is a key component of any functioning administrative system; if an agency abdicates its responsibility to guard, and even promote, this principle, courts should not be hesitant to do so.[366]

Finally, acknowledgment that an agency's interpretation has remained unchanged fosters, as one scholar notes, "a kind of *stare decisis* in order to merit judicial deference."[367] By putting agencies on notice that courts will look to the consistency of the agency's interpretation, agencies will consequently be less likely to reinterpret their regulation without careful consideration that a court might reject that new interpretation. This factor would thus benefit both the public and the agency itself in its decision-making process.

c. The Format by Which the Agency Expresses Its Interpretation

The next factor a court would examine is the format of the agency's interpretation. As Professor Anthony has observed, an agency's interpretation generally can be expressed in numerous forms.[368]

To the extent an agency's interpretation of a regulation is expressed formally (e.g., through a notice and comment procedure), this factor would clearly militate in favor of deference to that interpretation. In fact, aware of the importance of this consideration to whether it will receive deference, an agency would have the opportunity to take steps to express the interpretation in the most formal, practicable manner. This would promote transparency in the administrative state because, for the most part, the

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consistently applied administrative interpretation." 402 U.S. 99, 105 (1971).

[363] Atchison, Topeka & Sante Fe R.R. v. Wichita Bd. of Trade, 412 U.S. 800, 808 (1973).

[364] Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2166 (2012).

[365] Good Samaritan Hosp. v. Shalala, 508 U.S. 402, 417 (1993).

[366] Although hers was not the prevailing view, Justice O'Connor's opinion in *Gardebring v. Jenkins* explained that she would have rejected an agency's interpretation under the *Seminole Rock* standard because the agency had taken "two inconsistent positions" during the litigation. 485 U.S. 415, 432–33 (O'Connor, J., concurring in part and dissenting in part).

[367] Aprill, *supra* note 360, at 2113.

[368] *See supra* text accompanying note 45.

more formal the format of an interpretation, the more likely the agency will have engaged in a thorough analysis of its interpretation. For instance, unlike an interpretation set forth in an amicus brief (or for the first time during an adjudication), formal documents, such as guidance manuals and policy statements, are more likely to set forth a complete, reasoned, and deliberate interpretation, even though they were not developed through notice and comment procedures.

There are, of course, many more ways interpretations can be expressed informally by an agency. And while it is unrealistic (and ill-advised) to assess and compare the relative weight of each format here, one format is worthy of mention. There is reason to suggest that courts should be wary of deferring to agency interpretations that have been asserted during litigation and especially those submitted through an amicus brief. By their nature, these litigation positions generally do not carry with them the weight and judgment typically associated with agency interpretations expressed in other informal formats, and therefore should be entitled to less weight during juridical review of the deference question.

For example, the Court in *SmithKline Beecham* reaffirmed its view originally set forth in *Bowen* that it would refuse to defer interpretations that were mere post hoc rationalizations by the agency.[369] In particular, the Court warned that "[d]eference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate."[370] Relatedly, the consideration of this factor would help ensure that the interpretation reflects "the agency's fair and considered judgment on the matter in question."[371] And a prime indicator of whether an interpretation is an agency's "fair and considered judgment" would include the format by which the agency sets forth its interpretation.[372] Thus, a renewed and more meaningful consideration of whether an agency's view is a mere litigating position or post hoc rationalization would lead to more reasoned

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[369] *SmithKline Beecham*, 132 S. Ct. at 2166; Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212 (1988). I recognize that the Court would have to retreat from its view that briefs, such as amicus briefs, that set forth an interpretation for the very first time, should receive *Seminole Rock* deference. *See* Chase Bank USA, N.A. v. McCoy, 131 S. Ct. 871, 881 (2011) (deferring to an interpretation presented in an amicus brief when there is no reason to scrutinize the brief as a "*post hoc* rationalization").

[370] *Bowen*, 488 U.S. at 213.

[371] Auer v. Robbins, 519 U.S. 452, 462 (1997); *see also* Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan, 555 U.S. 285, 296 n.7 (2009) (rejecting the notion that "the fact that the interpretation is stated in a legal brief make[s] it unworthy of deference").

[372] Therefore, an analysis of the format also dovetails with an analysis of the consistency of the agency's interpretation. For instance, a district court has noted that "[a]n agency may revise or alter its interpretation over time, but this revised interpretation may be entitled to less deference than a position consistently held, particularly when the agency does not provide a reasoned analysis for the revision." Ohio Valley Envtl. Coal. v. U.S. Army Corps of Eng'rs, No. 3:05-0784, 2007 U.S. Dist. LEXIS 97432, at *32 (S.D. W. Va. June 13, 2007) (citing Good Samaritan Hosp. v. Shalala, 508 U.S. 402, 417 (1993)).

interpretations.

This is not to say that the agency cannot issue an interpretation without going through a notice and comment process.[373] If the agency does not do so, it may utilize the "interpretative rules" exemption found in section 553 of the APA.[374] By proceeding in this manner, the interpretation would not be subject to more involved APA procedures. At the same time, however, the agency's interpretation would be subject to increased scrutiny by the court.[375]

d. Whether the Regulation Merely Repeats Statutory Language

The final factor that courts would consider is whether the regulation that the agency purports to interpret merely restates or "parrots" the statutory language. In these instances, the agency's proffered interpretation is not actually an interpretation of the regulation. Rather, it is actually the agency's interpretation of the statutory language.

In light of the recent decisions in *Mead* and *Christensen*, there is a legitimate concern that the agency might attempt to use its interpretation of its regulation as a subterfuge for interpreting the statute to gain a more deferential standard. Under these decisions, informal interpretations of statutes are no longer interpreted under *Chevron*'s highly deferential standard.[376] Instead, they are to be reviewed under *Skidmore*'s less deferential standard. An agency thus could gain a "deferential advantage" if it were to succeed in having its informal interpretation of a regulation that mirrors the statutory language reviewed under *Seminole Rock*, rather than *Skidmore*.[377] Following the general maxim that "what cannot be done

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[373] *See* Asimow & Anthony, *supra* note 358, at 17 ("[A] changed agency interpretation of a regulation need not be promulgated by notice and comment, but can be attacked for failure to supply an adequate explanation or on grounds of incorrectness.").

[374] 5 U.S.C. § 553 (2012).

[375] As Professors Asimow and Anthony persuasively argue:

> The agency should bear responsibility for the clarity of its regulations, which are legislative acts objectively put forth for all to see and to interpret by their lights. An agency interpretation should of course get fair judicial consideration. But a private party ought to be able to derive its own interpretation and argue it to the court, without being automatically trumped by the agency's (often self-serving) interpretation.

Asimow & Anthony, *supra* note 358, at 17. This would ensure consistency with the "[t]he manifest purpose of APA § 706, which mandates that 'the reviewing court . . . shall determine the meaning or applicability of the terms of an agency action,' is to give affected persons recourse to an independent judicial interpreter." *Id.* (second alteration in original) (quoting 5 U.S.C. § 706 (1994)).

[376] *See* cases cited *supra* note 90.

[377] *See* Anthony & Asimow, *supra* note 6, at 11 ("Canny agency counsel might evade *Christensen*'s rule denying strong deference to informal agency interpretations of statutes, by crafting informal interpretive documents that purport to interpret regulations rather than the governing statute. In this way an informally-issued agency position could command deference under *Auer-Seminole Rock* where it could not get deference under *Chevron*."). Indeed, that is precisely what the United States

directly also cannot be done indirectly," when a court concludes that a regulation is merely "parroting" the statutory language, it should decline to apply *Seminole Rock* deference to the agency's interpretation.

Irrespective of an agency's attempt to game the system, more fundamentally, as the Court observed in *Gonzales v. Oregon*, "[a]n agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language."[378] Inclusion of this factor in this new approach would therefore screen out those situations and have the added benefit of bringing some consistency to this area of law.

C. *Applying the New Approach*

With these factors in place, the question remains how to apply the approach in practice. Although I do not propose a specific method for making the final determination, such as weighing one factor more than another, it should be fairly apparent whether a court should defer to the agency's interpretation once each factor is explored.

To be sure, this ultimate balancing of the factors does require, to some degree, a subjective determination of whether to accept an agency's interpretation. But such subjectivity is present even in highly deferential standards such as *Chevron*'s controlling deference test. For example, in *Chevron*, courts must determine whether the statutory language is ambiguous and then whether the interpretation is "reasonable."[379]

Any subjectivity inherent in the test proposed above is far less subjective than *Skidmore*'s test. For instance, contrary to *Skidmore*, the factors of the proposed test do not call for a weighing of the merits of the agency's interpretation. Under *Skidmore*, courts weigh an interpretation according to "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[380] Principal among these is the court's assessment of the "validity" of the agency's interpretation. Therefore, despite the presence of the other factors, the determination of whether to defer often rests on whether the court subjectively believes that the agency's view is valid.

Viewed in this light, an analysis of the factors proposed above allows much less room for variation because, as a general matter, each of the

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attempted to do in *Christensen*. Christensen v. Harris Cnty., 529 U.S. 576, 588 (2000); *see also* Gonzales v. Oregon, 546 U.S. 243, 256 (2006) ("The Government first argues that the Interpretive Rule is an elaboration of one of the Attorney General's own regulations . . . . [and therefore] is entitled to considerable deference in accordance with *Auer*.").

[378] *Gonzales*, 546 U.S. at 244.

[379] Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984).

[380] Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

factors calls for an objective answer. For instance, most of them often call for a simple "yes" or "no" answer: Did the agency state a contrary intent that it is proposing now? Does the current interpretation conflict with its past interpretation? Does the regulation merely parrot the statutory language? Although a court is left to determine whether the factors compel the conclusion that it should accept the agency's interpretation, such a determination mostly weighs on objective criteria.[381]

Therefore, by relying upon objective factors, thereby limiting the subjective inquiry, and erring in a sense to deference, the new approach proposed herein falls comfortably between *Chevron*'s controlling deference and *Skidmore*'s less deferential treatment that the courts apply when reviewing an agency's interpretation of a statutory provision. Such an approach would enable the Court to refine the deference regime to achieve better workability, greater fairness, transparency, and increased public participation, without overruling the *Seminole Rock* decision altogether. It would also "respect the agency's expertise, but preserve[] for the courts their traditional power of interpretation where the agency has not promulgated its position by exercise of delegated legislative power."[382]

VI. CONCLUSION

In the end, I believe adoption of this new approach will be effective at taking the courts, the public, and administrative agencies out from their respective "rock and a hard place."[383] Courts, for instance, have been understandably hesitant to give controlling deference to agencies (e.g., *Seminole Rock* and *Chevron*) in interpretive cases because it may constitute an abdication of the judicial role. On the other hand, courts have also been concerned about withholding the proper amount of deference agencies

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[381] Even the factor that calls for courts to look at the format by which the interpretation is set forth can be viewed objectively. As noted above, an interpretation expressed in myriad ways: manuals, court briefs, interpretive rules, policy statements, opinion letters, correspondence, guidelines, press releases, testimony before Congress, internal memoranda, speeches, the preamble of the final rule. These can be generally classified according to their indicia of reliability. *See supra* Part V.B.2.c.

[382] Anthony & Asimow, *supra* note 6, at 21.

[383] I use the phrase "between a rock and a hard place" to represent a dilemma or position where there are two largely unsatisfactory choices. Although this term is believed to have originated in the United States, it is closely related to the Greek mythological choice sailors had to face when navigating a course that would bring them into close proximity to two sea monsters, Scylla and Charybdis. As described by Homer in *The Odyssey*, avoiding one meant approaching too closely to the other, with either option having dire consequences. HOMER, THE ODYSSEY 274–75 (Robert Fagles trans., Penguin Books 1996). The earliest known printed reference in the U.S. is reported to be in the "Dialect Notes V" published by the American Dialect Society in 1921. *Between a Rock and a Hard Place*, KNOW YOUR PHRASE, http://www.knowyourphrase.com/phrase-meanings/Between-Rock-and-Hard-Place.html (last visited on Aug. 25, 2013). Some suggest that it stems from the illegal "Bisbee Deportations incident of 1917" in which miners at the Copper Queen Mining Company in Bisbee, Arizona, were forced to choose between harsh labor conditions (at the rock-face) or deportation and likely unemployment and poverty (a hard place). *Id.*

deserve (e.g., *Skidmore*) because doing so may improperly shift the regulatory burden and policy-making choices to the courts. Given the uncertainty in this area of the law generally, and the doctrinal confusion with respect to *Seminole Rock* specifically, agencies, for their part, are often caught between deciding whether to interpret a regulation informally, or engage in a more costly and time consuming procedure involving the notice and comment procedure of the APA. It thus seems clear that both agencies and courts would benefit from a clearly articulated and more balanced standard to look to when undertaking their respective roles in the legal and administrative processes.

And the same can be said with respect to the public, and, by extension, regulated industries. With this new approach, an administrative agency would have a diminished incentive to promulgate vague regulations (thereby limiting its broad leeway to interpret them in the future), and a diminished opportunity to re-interpret a regulation routinely without adequate notice. The new approach outlined herein would promote much-needed certainty for the public. At the same time, it would protect some of the much-needed deference and flexibility that the public expects to be given to the expert and experienced administrative agency responsible for administering the statute. The approach consequently has the effect of freeing the public and industry from facing two unsatisfactory scenarios—too much deference to the agency, creating regulatory uncertainty, and too little deference, creating administrative inflexibility.